NO. 41945-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL ELLISON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge John R. Hickman

No. 10-1-02462-1

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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2. Whether the officers properly searched a backpack found with the defendant incident to his arrest?

B. STATEMENT OF THE CASE.

1. Procedure

On June 2, 2010, based on an incident that occurred on June 4, 2010 charged the defendant with: Count I, identity theft in the second degree; Count II, identity theft in the second degree; Count III, unlawful possession of payment instruments; and Count IV, possessing stolen property in the second degree. CP 1-3.

On June 29, 2010 the State filed an amended information adding 20 additional counts of identity theft and possessing stolen property. CP 7-17.

The defendant filed a motion to suppress evidence, as well as a supplemental motion to suppress in which he claimed that the officers had no authority to search a backpack that was found where he was hiding. CP 21-27. The defendant later filed a supplemental motion to suppress

evidence in which he further elaborated his arguments that the evidence from the backpack should be suppressed, including making arguments based on ***Arizona v. Gant***. CP 41-48; ***Arizona v. Gant*** 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). The State filed a response. CP 51-54. The court held the search of the backpack was lawful and admitted the evidence. CP 68-71.

The parties entered into an agreement in which the defendant waived his right to a jury trial, and agreed to stipulated facts that the court would use to determine whether the defendant was guilty of the crimes charged. CP 55-63; [Memorandum of Journal Entry filed 02-07-11]. The court found the defendant guilty. CP 76-80.

On March 25, 2011 the court sentenced the defendant to an exceptional sentence above the standard range based on an offender score of 29 on each count for a total sentence of 86 months. CP 84-100; 124-126.

A notice of appeal was timely filed on March 30, 2011.

2. Facts

Because this was a stipulated facts bench trial, the following facts are taken from the Agreement Relating to Stipulated Facts Trial. CP 55-63.

Tacoma Police Department officers Bret Beall and Eric Barry were dispatched to the residence of Sunshine McDuffie on June 4, 2010, just a few minute past midnight. The nature of the dispatch was a domestic violence/unwanted person call. The two officers were working as a two man unit. The officers were advised by their dispatch that Sunshine McDuffie reported that her ex-husband, defendant Michael Ellison, had arrived on foot and was on her back patio and refusing to leave. McDuffie provided a description of Ellison as being a white male wearing a red jacket and jeans. The residence where the officers were dispatched was located at 3608 South Madison Street in Tacoma, Pierce County, Washington.

When the officers arrived at McDuffie's residence they both initially checked the backyard of the residence, but did not see anyone in the backyard. Officer Beal moved towards the front yard to contact McDuffie while Officer Barry continued to check the back patio area. Officer Barry observed a blanket covering several items on the back patio. He looked under the blanket and saw the defendant's legs. He also saw a blue backpack in between the defendant's legs. Officer Barry identified himself to the defendant and told him to come out. The defendant refused. The officer pulled the blanket off the defendant and ordered him to show his hands.

Officer Beal heard Officer Barry giving these verbal commands and ran to the back patio area. He observed the defendant sitting in a chair that had earlier been covered by a blanket. That blanket was on the ground when Officer Beal arrived. The defendant was ordered to his stomach and Officer Beal placed him into handcuffs. Officer Beal asked the defendant why he was hiding. The defendant stated that he was not hiding, but was just trying to stay warm. Officer Beal then asked him why he was still at the residence when he had been asked to leave. The defendant shrugged his shoulders.

At about this time the officers were advised by LESA records that the defendant had several outstanding warrants that had been confirmed. Those warrants were from DOC, Tacoma Municipal Court, and Lakewood Municipal Court. The defendant was arrested on those outstanding warrants. During a search of the defendant's person incident to arrest, the officers located a Samsung cell phone and a Verizon cell phone. Both appeared to be working, but when asked why he had both, the defendant said that only one of them worked. Officer Beal then advised the defendant of his Miranda warnings from his department issued Miranda form. The defendant stated that he understood his rights and said he would answer questions. Officer Beal asked the defendant about the blue backpack that Officer Barry had seen between the defendant's legs while

he was seated in the chair. Officer Beal asked the defendant if the backpack was his. Both officers heard the defendant state that it was his backpack. Officer Beal then asked the defendant if anything else on the patio was his, and he stated, "No."

Officer Beal then searched the defendant's backpack. This occurred shortly after the defendant's arrest, and on the patio in the presence of the defendant. In the front pouch of the pack the officer located two more cell phones, an IPod, a memory stick, and a digital camera. The officer asked the defendant why he had so many cell phones and other electronic items and the defendant replied that a friend had given them to him to get rid of. The officer asked the defendant if they were stolen, and he shrugged his shoulders and said "A friend gave them to me." Officer Beal asked the defendant how he planned on getting rid of the items and he shrugged his shoulders again.

The officer then found two prescription bottles with the labels ripped off that contained an assortment of pills. Officer Beal asked the defendant if the pills were his, and he replied, "No, that's not my backpack." The officer pointed out that the defendant already said that the backpack was his and the defendant replied, "No I didn't." The backpack also contained a baggie containing hypodermic needles, more pills, a scale, and baggies. The defendant denied that the items were his.

In the large pouch of the backpack the officer located a large plastic bag that contained numerous financial documents and personal checks. The following items were documented by Officer Beal and Detective Kim Sheskey as being in the backpack. Also documented below is the information obtained by the officers from each of the victims they were able to contact following the defendant's arrest:

1) There were check books and checks in the names of Karen Richardson, Zoe Allen, Anna Young, and Serghei Ceban. Officer Barry contacted Karen Richardson that night. Ms. Richardson reported her checks were stolen during a burglary two weeks earlier. Detective Sheskey later contacted Zoe Allen, Anna Young, and Serghei Ceban. Zoe Allen reported that she had placed her outgoing bills containing check payments into the community mailbox and stated that there were still three other checks missing from her mail. Serghei Ceban similarly reported that he had placed check in the outgoing mail in a community mailbox. Anna Young and Serghei Ceban both resided at that time at the Fairway Height Apartments. When Michael Ellison was booked into Pierce County Jail, he provided a home address at the Fairway Height apartment complex. Richardson, Young, and Ceban all confirmed that they did not know the defendant;

2) There was a Verizon wireless customer receipt in the name of Bo Bounthysavath at 6237 Lakewood Dr, Apt. 219A in University Place. The order was for a Verizon Wireless Razzle Digital cellular telephone dated 04/17/2010. There is no apartment 219A at 6237 Lakewood Dr. The address of 6237 Lakewood Dr, Apt. 219 in University Place corresponds with the address provided by Michael Ellison during his arrest. Detective Sheskey contacted Bo Bounthysavath. (The full first name for Bounthysavath is Bounma). Bounthysavath related he has been dealing with the theft of his identity since his name and social security information was among the items stolen during a vehicle prowl at Wells Fargo at 5245 Pacific Avenue under Tacoma case #100480927. Bounma Bounthysavath related there have been unauthorized accounts established with Verizon and Sprint. Bounma Bounthysavath's correct address is in East Tacoma and not at the Fairway Height Apartments. Bounma Bounthysavath does not know Michael Ellison.

3) There was a Bank of America loan document addressed to Aaron Souriyo. The Bank of America loan document included account numbers for Aaron Souriyo. There was a Department of Homeland Security Notice of Action document addressed to Sommy Souriyo.

4) There were birth certificates for Jacob Vestal, Jordyn Vestal, Marjorie Morevac, and Mavis Morevac. There were Social

Security Administration documents with the social security numbers for Jacob Vestal and Jordyn Vestal. There was also a medical record containing the date of birth and social security number for Michelle Vestal. Detective Sheskey contacted Michelle Vestal and she related the documents were in a locked box which was stolen during a burglary in March 2010 under Federal Way Police case #P10003303. Jacob Vestal and Jordyn Vestal are the children of Michelle Vestal. Marjorie Morevac is the mother of Michelle Vestal. The birth certificates for the Morevacs as well as the Vestal documents had been stored inside the stolen locked box.

5) There were printouts of email documents addressed to Michael Ellison at heavenbound1277mae@yahoo.com from "Rebecca" at bbbexter@gmail.com. The email chain indicated that "Rebecca" received an email from "Alex Impala" at impalaalex@gmail.com. The email from "Alex Impala" offered tips on how to effectively interpret and obtain Bank of America credit card numbers and use them with Verizon. "Alex Impala" also provided bank account numbers belonging to various people, with addresses and names in the email. "Rebecca" sent this email to Michael Ellison as well as a listing of credit card numbers, names, addresses and telephone numbers. Detective Sheskey determined that "Rebecca" is Rebecca Nutu and "Alex Impala" is Alexander Gibson. Also

included in the email printouts was an email from "Rebecca" to the defendant that was dated 4/3/10. The email stated, "hey! How you been! I graduated drug court last week. Can you get me any pain killers?" There is a response from Michael Ellison dated 4/5/10 that states in part as follows: "what up yo! Long time no talk. Congratulations on ur graduation!!! Yes I can get pain killers but what kind r u looking 4? U can e-mail me back or call me @253-208-8332. do you still got action on numbers? I need some badly. Bianca got sentenced to 22 months. She is at purdy's mission creek now …."

6) There were credit card account numbers discovered in the names of Johnny Graham, Bonnie McCartney, Eddie Washington, Marnie Sheeran, Rosanne Tipton, and William Dippolito. Detective Sheskey contacted each of them and learned the following: Johnny Graham and his wife Freida Graham reported that the credit card number belonged to Frieda's account which was closed in September 2009 due to suspicious activity. Freida Graham recalled the credit card number was fraudulently used at a Wal-Mart. Bonnie McCartney related her credit card number had been compromised in June 2009. There were purchases made at Rite Aid and Barnes and Noble. Bonnie McCartney recalled the credit card was tested at the Bed, Bath, and Beyond in Lakewood. Eddie Washington related the credit card number had been compromised sometime last May

or June of 2009. Eddie Washington recalled the credit card number was tested in California and was cancelled by the bank. Marnie Sheeran related her credit card was compromised in September and October 2009. Marnie Sheeran indicated there were fraudulent transactions with Verizon Wireless, Bed, Bath, and Beyond, and Safeway. Marnie Sheeran further related Bank of America reissued new credit cards that were continuously compromised. Marnie Sheeran eventually closed the Bank of America accounts all together in November 2009. Rosanne Tipton related that her Bank of America credit card account was compromised in the fall of 2009 under Tacoma Police Case #093210409. The fraudulent transactions were made to Verizon. Bank of America reissued a new credit card but the fraudulent transactions occurred again. William Dippolito related he did not recognize the credit card number but the address and the telephone number were correct. William Dippolito also did not recall if there were any suspicious circumstances involving his American Express credit cards.

7) Also in the backpack was a copy of a warrant with the defendant's name on it, and a card that was sent to Ellison from his girlfriend. Officer Beal asked the defendant why the pack contained things with his name on it if the pack was not his. He stated, "I don't know."

In addition to the items found in the backpack the officers located a metal tin that contained approximately 30 keys, some of which were house keys and some for vehicles. Some of the keys appeared to have been shaved. There were also two laptop computers on the ground near the backpack. Officer Beal contacted Sunshine McDuffie after the defendant was secured in the patrol car. McDuffie stated that the blue backpack, the metal tin that contained the 30 keys and two laptop computers all belonged to the defendant.

C. ARGUMENT.

1. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDINGS OF FACT (RE: CrR 3.6) NOS. 1 AND 14.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. ***State v. Hill***, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. ***Hill***, 123 Wn.2d at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. ***Hill***, at 644. Credibility determinations are for the trier of fact

and are not subject to appellate review. ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In ***Henderson Homes, Inc v. City of Bothell***, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

> It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also* ***State v. Jacobson***, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

a. Substantial Evidence Supported CrR 3.6 Finding No. 1.

The defense claims that substantial evidence did not support the court's finding no. 1. Br. App. 6-7. Finding no. 1 states:

> 1) On June 4, 2010, just after midnight, Tacoma Police Department officers Bret Beal and Eric Barry were dispatched to the residence of Sunshine McDuffie regarding a domestic violence/unwanted person call.

The testimony at the trial was that the nature of the dispatch was that a female caller reported that her ex-husband/estranged boyfriend was at her address on South Madison, knocking on the door and refusing to leave. I RP 9, ln. 24 to p. 10, ln. 7. Officers learned that Ellison was the boyfriend and when they ran his name for warrants they may have found warrants for domestic violence. I RP 11, ln. 13-15; I RP 38, ln. 6-7. Officer Beal stated Ellison had a warrant for DV assault. I RP 43, ln. 1. When asked why he had concerns about officer safety, Officer Beall stated:

> Well, because of the nature of the call: A domestic relationship between them. He was refusing to leave...
>
> I RP 43, ln. 14-15.

The classification of "domestic violence" applies to trespass in the second degree when committed by a family or household member, which is defined as including former spouses and persons who have had a dating relationship. Under RCW 10.99.020(3), (5)(k), and RCW 26.50.010(2). Trespass in the second degree occurs when a person knowingly enters or remains unlawfully in or upon the premises of another. RCW 9A.52.080(1).

Substantial evidence supported the court's finding no. 1 that the officers were dispatched regarding a "domestic violence/unwanted person call.

b. Substantial Evidence Supported the Courts Finding (CrR 3.6) no. 14

The defense claims that substantial evidence did not support the court's finding no. 14. Br. App. 7-8. Finding no. 14 states:

1) At the time of his arrest, the defendant was in possession and control of the blue backpack and all the contents therein and the pack was within the defendant's reasonable reach.

The backpack at issue here was found between defendant's feet where the defendant was sitting and hiding from police. *See* I RP 14, ln. 2-9. After being ordered to the ground several times, he got off the chair, then was on the ground, and was placed into handcuffs. I RP 42, ln. 5-7. Ellison then provided his name and date of birth and officers confirmed that he in fact had warrants. I RP 42, ln. 12-16. Once officers confirmed the existence of the warrants, Ellison was placed under arrest. I RP 43, ln. 3-5. Approximately one to five minutes elapsed between when the officers placed Ellison under arrest and advised him of his rights and then searched the pack. I RP 21, ln. 1-6; p. 54, ln. 11-14. Ellison was still present while the officers searched his pack. I RP 21, ln. 5-7; p. 54, ln. 15-17.

From these facts, the court could reasonably infer that at the time of his arrest the defendant was in possession and control of the backpack so that substantial evidence supports the court's finding (CrR 3.6) no. 14.

Because both the court's findings are supported by substantial evidence, they should be affirmed.

2. INCIDENT TO THE DEFENDANT'S ARREST, THE OFFICERS PROPERLY SEARCHED THE BACKPACK FOUND WITH HIM.

The court should be aware that the Washington Supreme Court is currently considering whether the "evidence of the crime of arrest" exception for warrantless searches incident to arrest applies in Washington. ***State v. Snapp***, No. 84223-0. ***Snapp*** is a consolidated case that was extensively briefed (including by Amici) and argued May 19, 2011. Additionally, on November 21, 2011 the Supreme Court accepted review of ***State v. Byrd***, No. 86399-7.

a. It Is Well Established That Incident To A Suspect's Lawful Arrest Officers May Search Items And Containers Found With The Suspect.

That an officer may search a suspect incident to a lawful arrest has long been the established law in Washington. *See* ***State v. Britton***, 137 Wash. 360, 361-65, 242 P. 377 (1926); ***State v. Gramps***, 146 Wash. 509, 263 P. 951 (1928). Indeed, it was so well established in even these earliest cases that refer to it as "search incident to arrest," that the court in ***Gramps*** took the doctrine for granted, merely noting that the search incident to arrest was entirely justified under the repeated holdings of the court,

without citing to any prior authority. *See* ***Gramps***, 146 Wash. 509, 512, 263 P. 951 (1928).

This rule continues to be applied by the courts of Washington. *See* ***State v. Olson***, 164 Wn. App. 187, 262 P.3d 828 (2011); ***State v. Ortega***, 159 Wn. App. 889, 894, 248 P.3d 1062 (2011).

It has also been long established that the search of a person incident to arrest includes those items that are immediately associated with the person, such as backpacks, wallets, purses, etc. *See, e.g.*, ***State v. Smith***, 119 Wn.2d 675, 835 P.2d 1025(1992) (search of fanny pack defendant was wearing); ***State v. Fladebo***, 113 Wn.2d 388, 779 P.2d 707 (1989) (search of purse); ***State v. Johnson***, 155 Wn. App. 270, 229 P.2d 824, *review denied*, 170 Wn.2d 1006 (2010) (purse that driver removed from vehicle and was holding at time of arrest)).

Under both the Washington and United States Constitutions a warrant is ordinarily required before officers may conduct a search of a person or place. ***State v. Smith***, 165 Wn.2d 511, 517, 199 P.3d 386 (2009). However, there are a significant number of narrowly drawn exceptions to the requirement of a warrant. *See* ***Smith***, 165 Wn.2d at 511.

One such exception is a search incident to arrest. However, the courts have recognized that Article I § 7 provides greater protection than the Fourth Amendment. ***State v. O'Neill***, 148 Wn.2d 564, 584, 62 P.3d

489 (2003). Prior Washington cases have held that the search incident to arrest exception is narrower under Article I § 7 than the Fourth Amendment. *See* ***O'Neill***, 148 Wn.2d at 584 (citing ***Fladebo***, 113 Wn.2d 388).

However, those cases were limited to searches of vehicles incident to arrest. While that area of the law under both the state and federal constitutions has undergone substantial changes, differences appear to persist at least as to the search of a vehicle incident to arrest, although those differences may not be the same as what was identified by earlier caselaw. *See, e.g.,* ***Arizona v. Gant*** and its Washington progeny. ***Arizona v. Gant*** 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); ***State v. Patton***, 167 Wn.2d 379, 219 P.3d 651 (2009); ***State v. Buelna Valdez***, 167 Wn.2d 761, 224 P.3d 751 (2009); ***State v. Afana***, 169 Wn.2d 169, 233 P.3d 879 (2010). This case does not involve the search of a vehicle incident to arrest, however the possible changes wrought by ***Gant*** are discussed in the following section.

It is well established under Washington case law that incident to a lawful arrest officers may search those items that are "immediately associated with the person." ***State v. Johnson***, 155 Wn. App. 270, 229 P.3d 824 (2010). Nonetheless, in a split published opinion, at least one panel of the court of appeals has disagreed with this standard and has

claimed to have abrogated it. ***State v. Byrd***, 162 Wn. App. 612, 616, 258 P.3d 686 (2011) (holding that an officer may not without a warrant, search an object that the arrestee cannot reach at the time of the search). However, the court of appeals has no authority to overrule ***State v. Smith*** which was issued by the Court of Appeals and remains the controlling law on this issue. ***Smith***, 165 Wn.2d 511.

Notwithstanding the opinion in ***Byrd***, where the backpack at issue here was found between defendant's feet where the defendant was sitting and hiding from police, the search of the backpack here falls well within established Washington law. *See* I RP 14, ln. 2-9.

b. <u>The Changes Wrought By ***Arizona v. Gant*** Do Not Support A Change In The Existing Washington Case Law.</u>

The defense argument is premised upon the changes wrought by ***Arizona v. Gant***, following which, the Washington Supreme Court has adopted language that could be construed to limit any search incident to arrest (and not just the search of a vehicle) only to those areas a defendant can readily access to pose a threat to officer safety, or to destroy evidence. *See* ***State v. Patton***, the defense argument is that by extension, once a defendant has been handcuffed and secured in a patrol car, officers may no longer conduct a search of items that were "immediately associated with the person," before arrest, but no longer are after arrest.

One term after the U.S. Supreme Court issued its opinion in ***Terry v. Ohio***, it issued its opinion in ***Chimel v. California***, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). In ***Chimel***, the court held that incident to the arrest of a suspect, the Fourth Amendment permitted police officers to conduct a warrantless search of the area under a suspect's immediate control into which a suspect might reach to either grab a weapon or to conceal or destroy evidence. ***Chimel***, 395 U.S. at 763-766.

The court in ***Chimel*** noted that its holding was:

> Entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may be searched without warrants "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Chimel, 395 U.S. at 764, n. 9 (quoting ***Carroll v. United States***, 267 U.S. 132, 153, 45 S. Ct. 280, 69 L. Ed. 543 (1925)) and citing ***Brinegar v. United States***, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

In ***New York v. Belton***, the court held that where a police officer has made a lawful custodial arrest of the occupant of a vehicle, the officer may undertake a search of the passenger compartment without violating the Fourth Amendment as a contemporaneous incident of arrest. *See* ***Thornton v. United States***, 541 U.S 651, 617, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (citing ***New York v. Belton***, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981)).

In ***Thornton v. United States***, the court interpreted ***Belton*** broadly and held that where an arrestee is a recent occupant of a vehicle, officers may search the vehicle incident to the arrest. ***Thornton***, 541 U.S. at 623-24. The court based this standard in part on "[t]he need for a clear rule, readily understood by police officers and not depending upon differing estimates of what items were or were not within reach of an arrestee at any particular moment..." ***Thornton***, 541 U.S. at 622-23.

However, significantly in ***Thornton***, Justice Scalia issued a concurring opinion in which he argued that the court's opinion in Thornton stretched the doctrine of search incident to arrest beyond the breaking point. ***Thornton***, 541 U.S. at 625 (Scalia concurring). In his concurrence, Justice Scalia argued that where in practice the vehicles are not searched until after arrestees are detained in handcuffs and placed in the back of a patrol car, there is no meaningful risk of the arrestee accessing the passenger compartment of the vehicle to obtain a weapon (or destroy evidence). ***Thornton***, 541 U.S. at 625-28 (Scalia [dissenting]). Justice Scalia instead argued that the search incident to arrest should be more correctly justified based upon a general interest in gathering evidence relevant to the crime for which the suspect had been arrested. ***Thornton***, 541 U.S. at 629 (Scalia [dissenting]).

Of particular relevance here is that the majority in ***Thornton*** rejected the argument Justice Scalia made in his concurrence.

Moreover, where the appellant argues that this court should hold the search unlawful were it served neither of the underlying reasons for a search incident to arrest, that argument is directly contrary to the Supreme Court's holding in Robinson, where the court expressly stated that the courts do not look to see whether the purposes of search incident to arrest are served. ***Robinson***, 414 U.S. at 235 (holding that the courts do not look to whether the search supported one of the underlying reasons of officer safety or preservation of evidence).

Further, in ***Knowles v. Iowa***, the court emphasized that, "[T]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." ***Knowles v. Iowa***, 525 U.S. 113, 116, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998) (quoting ***United States v. Robinson***, 414 U.S. 218, 234, n. 5, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)). To the extent the appellant argues that the fact that Gibson was arrested on a warrant for an unknown charge means that there could be no basis for the officer to have a safety concern; that argument would be contrary to the Supreme Court's holding in ***Knowles***.

Ultimately, in Thornton, the United States Supreme Court held that where a person was a recent occupant in immediate control of the car at the time of arrest, the officer is entitled to conduct a search incident to arrest.

In 2009 the United States Supreme Court issued its opinion in ***Arizona v. Gant***, [--- U.S. ---], 29 S. Ct. 1710, 173 L. Ed. 2d 485 (2009) which significantly limited what had widely been considered to be the established law with regard to the ability of officers to conduct a warrantless search of a vehicle incident to the arrest of an occupant. The ***Gant*** opinion did two things. First it limited the ability to conduct search of a vehicle incident to arrest under the emergency exceptions for officer safety or to prevent the destruction of evidence where the occupant of the vehicle was handcuffed and locked in the back of a patrol car. Second, it added what it referred to as a new exception to the warrant requirement that permitted officers to search the vehicle for evidence of the crime of arrest. The standard adopted by the Supreme Court in ***Gant*** was more restrictive of vehicle searches than the Washington Supreme Court had been under Article I § 7.

The Washington Supreme Court first considered the affect of ***Gant*** on Washington law in ***State v. Patton***, 167 Wn.2d 379, 219 P.3d 651 (2009). Rather than following *stare decisis* and accepting that the Fourth Amendment provided greater protection that article I § 7, the Washington Supreme court undertook an independent analysis of the search of a vehicle incident to the arrest of an occupant under Article I § 7 in light of ***Gant***. The court in ***Patton*** then abandoned what had been the established precedent in Washington and returned to the standard set forth in an earlier Washington case, ***State v. Ringer***, 100 Wn.2d 686, 674 P.2d 1240 (1984).

In ***Ringer***, the court stated the following:

> Based on our understanding of Const. art. 1, § 7, we conclude that, when a lawful arrest is made, the arresting officer may search the person arrested and the area within his immediate control. *See* ***State v. Michaels***, supra. A warrantless search in this situation is permissible only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.

This language was picked up in ***Patton*** and its progeny.

> Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.

Patton, 167 Wn.2d at 395. *See also* ***State v. Buelna Valdez***, 167 Wn.2d 761, 779, 224 P.3d 751 (2009) ("There was no showing that a delay to obtain a warrant would have endangered officers or resulted in evidence related to the crime of arrest being concealed or destroyed."); ***State v. Afana***, 169 Wn.2d 169, 177, 233 P.3d 879 (2010).

Unfortunately, much of the analysis in ***Ringer*** is flawed where its use of many of the earlier cases is not accurate. Rather than review all those problems here, it is sufficient to refer to Justice Durham's concurring split opinion in ***State v. Stroud***, which gives an accurate review of how the court in Ringer misapplied many of the cases it relied upon and thereby adopted a flawed legal analysis. *See* ***State v. Stroud***, 106 Wn.2d

144, 155-59, 720 P.2d 436 (1986) (Durham, J. concurring in the result). Not discussed by Justice Durham, (because the issue was not properly before the court) but particularly relevant in this case is the fact that court in ***Ringer*** conflates the exception permitting a warrantless search incident to arrest for evidence of the crime of arrest with the exigent circumstance exceptions to the warrant requirement to protect officer safety and prevent the destruction of evidence.

The issue in this case is the direct result of that erroneous conflation of the two exceptions in ***Ringer***. The result of that conflation is that the language from ***Ringer*** improperly imposes a higher and improper standard on the State than exists under either exception alone.

It is the State's position that the "evidence of the crime of arrest" exception is a separate exception that independently authorizes the search of the backpack.

A thorough analysis of the jurisprudential origins and underpinnings of the search incident to arrest rule are reviewed in detail in LaFave, Wayne, R, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 4th ed., c. 1994, 2011 § 5.2(b)ff, §5.5(a)ff. For the sake of expedience, that discussion is not repeated here, although copies of the sections (including the pocket parts) are attached for the convenience of the court and opposing counsel.

The central issue of the analysis of LaFave as cited above, at least as it pertains to this case is that it was possible to infer from the ruling in

Chimel that once a suspect is handcuffed and access to a container has been removed the search incident to arrest is no longer justified because the container is no longer within the arrestee's immediate control. *See* LaFave, § 5.5(a) (citing ***Chimel*** 395 U.S. 752. Notwithstanding this possible inference from the opinion in ***Chimel***, the pre-***Chadwick*** cases routinely allowed the search of a container after the defendant was safely detained. LaFave, § 5.5(a), p. 211-213 (citing ***United States v. Chadwick***, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), overturned by ***California v. Acevedo***, 500 U.S. 565, 579, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991)). Indeed, as cited in section a. above, early Washington cases also did not prohibit such searches after the defendant was under arrest.

By way of further argument, the State would simply note that a number of practical considerations with containers "immediately associated with the person" justify their continued search incident to arrest, even where a defendant is detained in handcuffs and removed from the item.

The court in ***Acevedo*** recognized that at one level car is also a container. *See* ***Acevedo***, 500 U.S. at 580. However, a vehicle is a container with unique properties, on the one hand because it is easily mobile if driven, and on the other hand because it is easily secured (by being locked), resistant to the weather and elements, and large and therefore easily located.

Containers intimately associated with the person, such as backpacks, purses, fanny packs, etc., are generally not secure, not safe from the elements, and being relatively small are not easily located. They can be easily mobile if placed into a vehicle.

This raises a number of issues with regard to bag-like containers, including purses and backpacks. As was the case here, they are often located on private property belonging to a third party. Thus, there may not be a reasonable option for the officer to leave the bag where it was found. That is especially so where, as here, the defendant was violating a no contact order, so that it should not remain on the other parties premises. Nor under community care taking standards should an officer without inventorying the contents leave it where children or other persons could end up accessing it. It is not uncommon for backpacks found on arrestees to contain firearms, explosives (pipe bombs or otherwise), or contraband, such as controlled substances, or toxic items (from a meth lab or otherwise). So leaving such a container where found is not a reasonable option for the officer, and could subject officers or their agency to tort liability.

In the event the item contained evidence, leaving a backpack or purse until a search warrant can be obtained could result in it being moved or interfered with before a warrant could be obtained. It could also result in weather conditions, such as rain, flowing water or cold temperatures damaging or destroying evidence.

As a result, in nearly every instance, it would be necessary for an officer to secure the backpack or purse even if the suspect did not want it preserved.

For all the same reasons, an officer cannot put such a pack even into the trunk of a patrol car without first conducting an inventory of the contents of the pack. Indeed, the officer here referred to that concern. I RP 20, ln. 4-8. A bump or vibrations while driving could cause a firearm to discharge, explosives to go off, or hazardous substances (including controlled substances) to be released.

Additionally, any evidence in the pack could be damaged or destroyed by moving it without first inspecting it. Even a suspect's request that the backpack or purse be turned over to a third party could be a means of removing or destroying evidence.

Of course, it goes without saying that such evidence could not be turned over to an arrestee while that person is detained and/or transported in the patrol car.

These factual concerns highlight why the courts have always recognized that a search incident to arrest extends to those things in an arrestee's possession, those things "immediately associated with the person." They have allowed searches of such items because a search is the only reasonable thing that can be done with them before any further action is taken.

Here the backpack was at the defendant's feet, and he remained proximate to it even after he was arrested and the backpack was searched. Accordingly, the officers properly searched the backpack incident to the defendant's arrest.

c. Exigent Circumstances Is A Separate Exception To The Warrant Requirement From Search of A Vehicle Incident To Arrest.

It has long been established that a warrantless search may be conducted where there are exigent circumstances. ***Smith***, 165 Wn.2d at 517; ***State v. Cardenas***, 146 Wn.2d 400, 405, 47 P.3d 127, 57 P.3d 1156 (2002); ***State v. Wolfe***, 5 Wn. App. 153, 156, 486 P.2d 1143 (1971). *See also* ***State v. Young***, 76 Wn.2d 212, 214, 455 P.2d 595 (1969)(holding that officers who had a warrant, but failed to comply with service requirement were justified by exigent circumstances). Some such circumstances include when the officers have a good faith belief that they or someone else is at risk of bodily harm, when the person to be arrested is fleeing, or attempting to destroy evidence. ***Ker v. State of Cal.***, 347 U.S. 23, 39-40, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); ***Miller v. U.S.***,357 U.S. 301, 307, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958). In Washington, the court allowed a warrantless search incident to arrest based on exigent circumstances in ***State v. Baker***, 4 Wn. App. 121, 125, 480 P.2d 778 (1971)(relying on

Chimel for the position that a warrantless search incident to arrest was valid based on the exigent circumstances of risk of flight or destruction of evidence). Noteworthy is that the concern for destruction of evidence was not expressly limited to the crime of arrest, much like the language of the current version of the rule under ***Gant***. *See, e.g.,* ***State v. Campbell***, 15 Wn. App. 98, 547 P.2d 295 (1976)(where no one had been arrested, the court held that search of apartment to investigate recent burglary, which search led to the discovery of marijuana plants, was valid given the exigent circumstances of the burglary).

Thus, the purpose behind exigent circumstances exception applies to the reasonable risk of destruction of evidence of any crime, and is not limited to evidence of the crime of arrest, as is evidenced by the several cases referenced where the was no arrest at all at the time of the search. Moreover, the reasoning behind exigent circumstances applies equally to the destruction of evidence by third parties who are not under arrest. *See e.g.*, ***Young***, 76 Wn.2d at 214ff (officers serving search warrant failed to comply with service requirements where once they announced the heard screaming, yelling, and the sound of occupants scurrying and running throughout house so that officers entered within seconds, resulting in a race for the bathroom with everyone ending up there). *See also* H. Matthew Munson, ***State v. Parker***: Searching The Belongings Of

Nonarrested Vehicle Passengers During A Search Incident To Arrest. 75 Wash. L. Rev. 1299 (2000).

For example, if the officer has arrested the driver of a vehicle for driving on a suspended license and locked that driver in the back of a patrol car, but upon return to the vehicle observes an unarrested passenger attempting to destroy evidence that the driver possessed narcotics, exigent circumstances would entitle the officer to seize the narcotics evidence to prevent its destruction even though the passenger was not at that point under arrest.

Compare this example to the facts in ***State v. Huckaby***, 15 Wn. App. 280, 549 P.2d 35 (1976). In ***Huckaby***, officers entered the residence with permission in order to conduct a marijuana transaction and to arrest the defendant for an earlier transaction. ***Huckaby***, 15 Wn. App. at 282. After the defendant was under arrest the defendant's wife stood next to an open pantry in the kitchen and appeared to have her hand in a sack. ***Huckaby***, 15 Wn. App. at 282. Officers told her to keep her hands out of the sack, and one got up and looked into the pantry for weapons and observed what appeared to be bag of marijuana stems and a bag of marijuana seeds. ***Huckaby***, 15 Wn. App. at 282. Later, the bags were removed to a table by another officer looking for additional suspects. ***Huckaby***, 15 Wn. App. at 282. A warrant was obtained based solely on the odor of marijuana. ***Huckaby***, 15 Wn. App. at 283. While the case was decided on the basis of the validity of the entry of the officers and the

arrest, the evidence was all admitted at trial with the court holding that the seizure as a result of the arrest was proper. ***Huckaby***, 15 Wn. App. 291.

This point is even further highlighted in the case of weapons. Any time an officer contacting a vehicle has a reasonable concern for officer safety, regardless of whether that concern is caused by an arrestee or someone else, the officer is entitled to check the occupants for weapons without a search warrant. ***State v. Acrey***, 148 Wn.2d 738, 753, 64 P.3d 594 (2003).

The point being made here is a crucial one. Exigent circumstances provide their own justification for a warrantless search, regardless of whether or not the person is under arrest. The only reason exigent circumstances have been tied to a search incident to arrest is because often at the point of arrest exigent circumstances arise. For the sake of a bright line rule, the court in ***Belton*** was viewed as having interpreted that connection broadly in favor of the officers. After ***Gant***, and in light of modern police practices, that connection is now viewed more narrowly. However, the essential point is that exigent circumstances do not depend on arrest. This is also why exigent circumstances are often equated with the emergency exception, and not search incident to arrest. *See* ***State v. Smith***, 165 Wn.2d 511, 519, 199 P.3d 386 (2009) (discussing ***State v. Smith***, 137 Wn. App. 262, 269, 153 P.3d 199 (2007); ***Hocker v. Woody***, 95 Wn.2d 822, 631 P.2d 372 (1981)(discussing "hot pursuit" as an

emergency exception). *See also* ***State v. Steinbrunn***, 54 Wn. App. 506, 509, 774 P.2d 55 (1989)(discussing the progressive diminution of blood alcohol level over time as an "emergency"); ***State v. Patterson***, 112 Wn.2d 731, 736, 774 P.2d 10 (1989)(quoting ***State v. Smith***, 88 Wn.2d 127, 135, 559 P.2d 970 (1977)).

Understanding that the jurisprudential basis of exigent circumstances operate independently of search incident to arrest makes it possible to understand the State's second point. That is that the traditional exception for a search incident to arrest for evidence of the crime of arrest is a separate and distinct exception from the exigent circumstance of preventing the destruction of evidence.

d. The Search of a Vehicle Incident To Arrest Is Its Own Exception To The Warrant Requirement.

In ***United States v. Robinson***, the court recognized that the general exception for search incident to arrest has historically been formulated into two distinct propositions. ***United States v. Robinson***, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). First, the search of a person by virtue of lawful arrest. ***Robinson***, 414 U.S. at 224. Second, search of the area within control of the arrestee. ***Robinson***, 414 U.S. at 224. The first is a search incident to arrest for evidence of the crime of arrest. The second

is a search based upon exigent circumstances. Morever, the dissent in ***Robinson*** also distinguishes between a warrantless search of the person incident to arrest and a warrantless search based upon exigent circumstances. *See also* ***United States v. Robinson***, 414 U.S. 218, 242-43, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973)(Marshall Dissenting).

One of the early cases from this state gives a particularly clear explanation of why a search incident to arrest for evidence of the crime of arrest differs from a search based upon exigent circumstances.

It has always been held that a peace officer, when he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested and take from him any evidence tending to prove the crime with which he is charged. If a search may be made of the person or clothing of a person lawfully arrested, then it would follow that a search may also be properly made of his grip or suit case, which he may be carrying. From this it seems to us to follow logically that a similar search, under the same circumstances, may be made of the automobile of which he has possession and control at the time of his arrest. This is true because the person arrested has the immediate physical possession, not only of the grips or suitcases which he is carrying, but also of the automobile which he is driving and of which he has control.

State v. Hughlett, 124 Wash. 366, 214 P. 841 (1923), *overruled by*, ***Ringer***, 100 Wn.2d at 669. While ***Hughlett*** was overruled by ***Ringer***, it was on a different ground. The holding of the court in ***Ringer*** was that officers may search the area within the arrestee's immediate control. ***Ringer***, 100 Wn.2d at 699. However, as indicated above, ***Ringer*** mistakenly conflates search incident with arrest with exigent circumstances.

The basis articulated in ***Hughlett*** has a very long history in the common law. *See* ***Thornton***, 541 U.S. at 629-30 (Justice Scalia concurring) (citing to ***United States v. Wilson***, 163 F. 338, 340, 343 (C.C.S.D.N.Y. 1908); ***Smith v. Jerome***, 47 Misc. 22, 23-24, 93 N.Y.S. 202, 202-03 (Sup.Ct.1905); ***Thornton v. State***, 117 Wis. 338, 346-47, 93 N.W. 1107, 1110 (1903); ***Ex Parte Hurn***, 92 Ala. 102, 112, 9 So. 515, 519-20 (1891); ***Thatcher v. Weeks***, 79 Me. 547, 548-49, 11 A. 599, 599-600 (1887); 1 F. Wharton Criminal Procedure § 97, pp. 136-137 (J. Kerr 10th ed.1918); 1 J. Bishop, Criminal Procedure § 211, p. 127 (2d ed. 1872)); cf. ***Spalding v. Preston***, 21 Vt. 9, 15, 1848 WL 1924 (1848); ***Queen v. Frost***, 9 Car. & P. 129, 131-134 (1839); ***King v. Kinsey***, 7 Car. & P. 447 (1836); ***King v. O'Donnell***, 7 Car. & P. 138 (1835); ***King v. Barnett***, 3 Car. & P. 600, 601 (1829).

As Justice Scalia noted in is concurrence, "The articulation in ***Bishop*** in 1872 is typical:

The officer who arrests a man on a criminal charge should consider the nature of the charge; and if he finds about the prisoner's person, or otherwise in his possession, either goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, he may take the same, and hold them to be disposed of as the court may direct."

Thornton, 541 U.S. at 630 (Justice Scalia concurring) (quoting ***Bishop***, §211 at 127).

A search incident to arrest for evidence of the crime of arrest is a separate exception from the exigent circumstances exception. The court should uphold the admission of the backpack on the basis of that exception as well.

D. CONCLUSION.

Substantial evidence supports the trial courts findings of fact (CrR 3.6) nos. 1 and 14.

The well established law of Washington long pre-dating ***Chimel*** and ***Belton*** has upheld the search of items in the arrestee's possession incident to arrest. Moreover, the separate exception for evidence of the

crime of arrest also supports the admissibility of the backpack. For all these reasons, the court should affirm the admissibility of the contents of the backpack and affirm the defendant's conviction.

DATED: December 19, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/19/11 C Johnson
Date Signature

Appendix A

SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 4th ed.,

LaFave, Wayne, R,

c. 1994, 2011

§ 5.2

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traffic violations) to facilitate searches for drugs and guns, often by resort to racial profiling.[456] Here again, the *Atwater* dissenters are right on target:

> [T]he majority gives officers unfettered discretion to choose [custodial arrest over issuance of a citation] without articulating a single reason why such action is appropriate.
>
> Such unbounded discretion carries with it grave potential for abuse. * * * Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. See *Whren* * * *. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness.

Library References

C.J.S. Arrest §§ 3–4, 16–49, 54, 61–63; C.J.S. Criminal Law §§ 334–335, 337–338; C.J.S. Motor Vehicles §§ 1321–1332, 1334–1335, 1344, 1365–1371, 1397–1400, 1442–1443, 1473, 1486–1487, 1496, 1508, 1518, 1526, 1532, 1543–1547, 1550.

West's Key No. Digests, Arrest ⇐63, 68(1)–68(5), 70; Automobiles ⇐349(10), 351.1; Criminal Law ⇐215.

§ 5.2 Search of the Person at Scene of Prior Arrest

Analysis

In *Chimel v. California*,[1] the Court declared that when an arrest is made "it is reasonable for the arresting officer to search the person

456. See § 1.4(e).

§ 5.2

1. 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape" and also "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." This language highlighted a very significant issue which the Court did not have occasion to resolve in *Chimel:* whether, on the one hand, the right to make such searches of the person flows automatically from the fact that a lawful arrest was made, or whether, on the other hand, such searches may be undertaken only when the facts of the individual case indicate some likelihood that either evidence or weapons will be found.

This question reached the lower courts with some frequency, usually in the context of an arrest for a minor traffic violation or some other lesser offense for which there could be no evidence and which would not of itself suggest that the perpetrator would be armed. Some courts took the position that a full search of the person incident to a lawful arrest was per se reasonable,[2] while others reached a contrary conclusion, often allowing no more than a pat-down when the only conceivable lawful purpose was protection of the arresting officer.[3] Finally, in *United States v. Robinson*[4] and the companion case of *Gustafson v. Florida*,[5] the Supreme Court held that the broader view was consistent with the protections of the Fourth Amendment.

(a) The *Robinson* and *Gustafson* cases.[6] *Robinson* involved these facts: Officer Jenks of the D.C. police department, upon observing Robinson driving a 1965 Cadillac, signalled him to stop. As a result of investigation following a check of Robinson's permit a few days earlier, Jenks knew that Robinson was operating a vehicle after revocation of his operator's permit and that he had subsequently obtained a temporary permit by misrepresentation. Upon being shown the temporary permit again, Jenks placed Robinson under arrest and then proceeded to search him. Because he could not determine the precise size or consistency of an object he felt in Robinson's breast pocket, Jenks removed it. The object was a cigarette package, within which Jenks found fourteen gelatin

2. E.g., United States v. Simmons, 302 A.2d 728 (D.C.App.1973); State v. Giragosian, 107 R.I. 657, 270 A.2d 921 (1970); State v. Coles, 20 Ohio Misc. 12, 249 N.E.2d 553 (1969); Watts v. State, 196 So.2d 79 (Miss.1967); Lane v. State, 424 S.W.2d 925 (Tex.Crim.App.1967).

3. E.g., People v. West, 31 Cal.App.3d 175, 107 Cal.Rptr. 127 (1973); People v. Jordan, 11 Ill.App.3d 482, 297 N.E.2d 273 (1973); State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971); People v. Adams, 32 N.Y.2d 451, 346 N.Y.S.2d 229, 299 N.E.2d 653 (1973); Commonwealth v. Freeman, 222 Pa.Super. 178, 293 A.2d 84 (1972). Other decisions taking this more limited view are collected in United States v. Robinson, 471 F.2d 1082, 1104 n. 39 (D.C.Cir.1972).

4. 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

5. 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973).

6. Much of what is said in the discussion which follows in this section first appeared in LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": The *Robinson* Dilemma, 1974 Sup.Ct.Rev. 127. See also Aaronson & Wallace, A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest, 64 Geo. L.J. 53 (1975); White, The Fourth Amendment as a Way of Talking About People: A Study of *Robinson* and *Matlock*, 1974 Sup. Ct.Rev. 165; Comments, 24 Emory L.J. 151 (1975); 63 Geo.L.J. 223 (1974); Notes, 23 Clev.St.L.Rev. 135 (1974); 7 Loy.L.A.L.Rev. 516 (1974); 1 Ohio N.L.Rev. 334 (1974); 7 Sw.U.L.Rev. 383 (1975).

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capsules of heroin. The officer's actions in making a full custody arrest (that is, for purposes of taking him to the station) and a full search incident thereto were required under department regulations. It appears that Jenks was rather routinely carrying out these instructions, for he later testified, "I just searched him. I didn't think about what I was looking for. I just searched him." Robinson's conviction for possession of heroin was overturned by the court of appeals; the plurality opinion concluded that when an arrest is made for a crime without evidence the search incident thereto must be limited to an intrusion reasonably required to discover weapons, which in the case of a full custody arrest for a traffic violation would be a frisk.[7]

The Supreme Court reversed. Justice Rehnquist, finding that "no doubt has been expressed" in the Court's prior decisions or the "early authorities" as to "the unqualified authority of the arresting authority to search the person of the arrestee," concluded there was no need "to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes." But his "more fundamental disagreement" with the court of appeals arose from "its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest," for he concluded:

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest[8] a full search of the person is not only an exception to the

7. The case was heard initially by a division of the court of appeals, which reversed the conviction, but upon rehearing en banc the case was remanded for a supplemental evidentiary hearing. 447 F.2d 1215 (D.C.Cir.1971). Upon the subsequent rehearing en banc, 471 F.2d 1082 (D.C.Cir. 1972), the plurality opinion was written by Judge Wright. Chief Judge Bazelon wrote a brief concurring opinion; Judge Wilkey, joined by three other members of the court, dissented.

8. In United States v. Mota, 982 F.2d 1384 (9th Cir.1993), the court held that if the police in fact make a custodial arrest but it is not "lawful" in the sense that the law of the jurisdiction where the arrest occurs requires resort to a noncustodial alternative, then the arrest and search are unconstitutional. For further consideration

warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

Justice Marshall, joined by Justices Douglas and Brennan, dissented. Criticizing the majority's approach as "a clear and marked departure from our long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment," they proceeded to assess the reasonableness of Jenks' conduct. They concluded that he acted improperly in opening the cigarette package, in that "there is no indication that he had reason to believe or did in fact believe that the package contained a weapon" and in any event "it would have been impossible for respondent to have used [a weapon therein] once the package was in the officer's hands."

The facts in *Gustafson* were similar. There a Florida officer arrested Gustafson for failure to have his operator's license in his possession, after which he searched him, finding marijuana cigarettes in a cigarette box. In affirming the judgment of the Florida Supreme Court upholding the conviction,[9] Justice Rehnquist concluded that *Robinson* controlled:

> Though the officer here was not required to take the petitioner into custody by police regulations as he was in *Robinson,* and there did not exist a departmental policy establishing the conditions under which a full-scale body search should be conducted, we do not find these differences determinative of the constitutional issue. * * * It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody.

The three *Robinson* dissenters dissented in *Gustafson* for the same reasons. Justice Stewart concurred in *Gustafson,*[10] and Justice Powell concurred in both cases, expressing the view "that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person."

Robinson and *Gustafson* have had a significant impact. They are very frequently cited by lower courts in upholding full searches incident to a custodial arrest.[11] Most noteworthy, however, is the fact that some

of *Mota* and whether state law may properly be "incorporated" into the Fourth Amendment in this way, see § 1.5(b).

9. 258 So.2d 1 (Fla.1972), reversing 243 So.2d 615 (Fla.App.1971).

10. See text at note 140 infra.

11. A particularly useful example of the impact of the *Robinson-Gustafson* rule is provided by People v. Traubert, 199 Colo. 322, 608 P.2d 342 (1980), where defendant was searched following his arrest for trying to break into a building. Defendant claimed there was no justification for the search in that there were no fruits (he had not gotten into the building), instrumentalities (the burglary tools had been found at the scene), or weapons (an unproductive frisk had already been conducted) to look for, but the court rejected the contention with the observation that under *Robinson* the right to search flows automatically from a lawful custodial arrest. See also People v. Bischofberger, 724 P.2d 660 (Colo.1986) (*Robinson* allows search of person arrested merely because of outstanding traffic warrants).

In State v. Kennel, 26 Ariz.App. 147, 546 P.2d 1156 (1976), *Robinson* was applied to the taking of custody of an intoxicated person for the purpose of transporting him to the local alcoholic reception center. Compare United States v. Gallop, 606 F.2d 836 (9th Cir.1979), holding that when police seized abusive persons for transportation to a detoxification center, characterized by

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of the state courts which had previously taken a narrower view of the authority to search the person incident to arrest have accepted the *Robinson-Gustafson* position, either on the ground that their earlier interpretation of the requirements of the Fourth Amendment has now been established as erroneous or on the ground that their earlier interpretation of comparable state constitutional provisions should be brought into line with the interpretation the Supreme Court has given to the Fourth Amendment.[12] But a few state courts have rejected *Robinson* and *Gustafson* and construed a state constitutional provision more narrowly.[13]

(b) The "general authority" to search incident to arrest. Justice Rehnquist pursued a two-step analysis in *Robinson;* his first inquiry concerned the "general authority" of the police to search incident to arrest, after which he then asked whether there was a need "to qualify the breadth of the general authority" with respect to the instant case. The dissenters, on the other hand, turned directly to "the only question presented in this case: The permissible scope of a search of the person incident to a lawful arrest for violation of a motor vehicle regulation." Without suggesting that the dissenters were necessarily in error in failing to address the broader question, it does appear useful to consider that issue here as a means of assessing *Robinson.* It is difficult to think clearly about the kind of case *Robinson* and *Gustafson* represent absent some conceptual framework within which to consider generally the distinct and common police practice of warrantless search incident to arrest. While the myth persists that warrantless searches are the exception,[14] the fact is that searches incident to arrest occur with the greatest frequency.[15] The broader question, therefore, is of overarching importance in current criminal justice administration.

statute as protective custody and not arrest, no *Robinson* search was permissible. See also State v. Lawrence, 58 Or.App. 423, 648 P.2d 1332 (1982) (detention of intoxicated person permits pat-down but no full search of person); State v. Loewen, 97 Wash.2d 562, 647 P.2d 489 (1982) (full search not allowed incident to transporting of disoriented and injured person to hospital).

12. People v. Weintraub, 35 N.Y.2d 351, 361 N.Y.S.2d 897, 320 N.E.2d 636 (1974); Hughes v. State, 522 P.2d 1331 (Okl.Crim.App.1974); State v. Florance, 270 Or. 169, 527 P.2d 1202 (1974) (on ground that *Robinson* should now be followed in interpreting comparable state constitutional provision, as that case presents a rule which will be better understood by police and confusion between federal and state rules is to be avoided).

13. Middleton v. State, 577 P.2d 1050 (Alaska 1978); People v. Maher, 17 Cal.3d 196, 130 Cal.Rptr. 508, 550 P.2d 1044 (1976); State v. Rosborough, 62 Haw. 238, 615 P.2d 84 (1980); State v. Dangerfield, 171 N.J. 446, 795 A.2d 250 (2002); State v. Paul T., 128 N.M. 360, 993 P.2d 74 (1999).

14. Thus, the *Robinson* dissenters state: "In the vast majority of cases, the determination of when the right of privacy must reasonably yield to the right of search is required to be made by a neutral judicial officer before the search is conducted."

15. See T. Taylor, Two Studies in Constitutional Interpretation 48 (1969).

"Comparison of the total number of search warrants issued with the arrests made is equally illuminating. In 1966 the New York police obtained 3,897 warrants and made 171,288 arrests. It is reliably reported that in San Francisco in 1966 there were 29,084 serious crimes reported to the police, who during the same year obtained only 19 search warrants." Model Code of Pre-Arraignment Procedure 493–94 (1975).

The *Robinson* majority stated the "general authority" in absolute terms: once there is a "custodial arrest" a "full search of the person" requires "no additional justification." Before inquiring into the historical support for such a broad doctrine, it is useful to note briefly how a narrower statement of authority might be constructed. A more limited doctrine might require some additional justification and might permit less than a full search; or, to state the proposition in the language used in *Terry v. Ohio*,[16] it might be said that notwithstanding the arrest any search of the person must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." Given the fact that there is general agreement that such a search may be undertaken only to discover weapons which the arrestee might otherwise use to resist arrest or escape and to discover evidence of the crime for which the arrest was made,[17] it might be postulated that a search of the person should be permitted *only* on probable cause to believe that such items will be found and *only* of the intensity necessary to find the items reasonably believed to be in the arrestee's possession.

The Supreme Court has quite consistently stated the authority to search the person incident to arrest in terms which suggest neither limitation. When the Court first enunciated the exclusionary rule in *Weeks v. United States*,[18] it emphasized that the instant case was "not an assertion of the right on the part of the Government, always recognized under English and the American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime." Similarly, in *Agnello v. United States*,[19] the Court noted: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime * * * in order to find and seize things connected with the crime as well as weapons and other things to effect an escape from custody, is not to be doubted." And the same year, in *Carroll v. United States*:[20] "When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."

Later, in *United States v. Rabinowitz*,[21] the majority asserted: "The right of the 'people to be secure in their persons' was certainly of as

16. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

17. In Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), it is stated that "the rule allowing contemporaneous searches is justified, for example, by the need to seize weapons * * * as well as by the need to prevent the destruction of evidence of the crime." Note, 78 Yale L.J. 433, 434 n.12 (1969) observes: "Despite the mysterious 'for example,' a thorough search of the case law reveals no other justifications for warrantless searches incident to arrest which do not collapse upon careful inspection into one of the two bases articulated in *Preston*." Model Code of Pre-Arraignment Procedure § SS 230.1 (1975), lists a third justification, namely, "to furnish appropriate custodial care," but this is better conceptualized as a search incident to the placing of the arrestee in a custodial facility, for it only comes into play, as the Code notes, "if the arrested individual is jailed." See also note 89 infra.

18. 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914).

19. 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925).

20. 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

21. 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950).

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much concern to the framers of the Constitution as the property of the person. Yet no one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England." In light of the fact that the *Rabinowitz* holding has not survived,[22] it is noteworthy that Justice Frankfurter's forceful dissent in that case also assumed an unqualified right to search the person.[23] More recently, in *Preston v. United States,*[24] a unanimous Court asserted: "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime."

Chimel v. California,[25] the last search and seizure decision of the Warren Court, deserves particular attention, for there the Court applied to search incident to arrest the aforementioned *Terry* principle that "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." In doing so, the Court reached the long overdue conclusion that a person's home may not be subjected to a warrantless search merely because he happens to be arrested there. Such a search, the majority indicated, is unreasonable because it lacks the justification which attends search of the person, about which the Court again spoke in the broadest possible terms:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

It is not difficult to read that language, as does Justice Rehnquist in *Robinson,* as stating that as a general rule there is a right to make a full search of the person of one lawfully arrested without any additional showing. In contrast to the language in *Terry,* where it is required that the officer have reason "to conclude * * * that the persons with whom he is dealing may be armed and presently dangerous," *Chimel* speaks of a search for "*any* weapons" which the arrestee "*might* seek to use." Likewise, *Chimel* states that there is a right to search for "*any* evidence on the arrestee's person," not of evidence reasonably believed by the

22. The holding, that the place of arrest could also be searched without a warrant incident to arrest, was overruled in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

23. He stated that "in order to protect the arresting officer and to deprive the prisoner of potential means of escape" and "to avoid destruction of evidence by the arrested person" the police "may search and seize * * * the things physically on the person arrested." The same may be said for the dissenters in the predecessor to *Rabinowitz,* Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947).

24. 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964).

25. 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

officer to be in the arrestee's possession. And no mention is to be found of any limitation on the intensity of the search of the person.

Yet, the fact remains that neither in *Chimel* nor in any of the other cases cited above did the Court have occasion to pass upon the admissibility of evidence seized from the person. Either the admissibility of that evidence was conceded, or—more often—a productive search of the person had not occurred. Thus, as Justice Rehnquist acknowledged in *Robinson,* "virtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta." There are other decisions of the Court in which the admissibility of items taken from an arrestee's person was in issue, but in these cases the battle has typically been over whether the arrest was lawful, and a careful examination of the facts of these cases makes untenable the conclusion that the Court has given tacit approval to an unqualified right to search an arrestee's person.[26]

Concluding that the Court was thus not "foreclosed by principles of stare decisis from further examination into history and practice in order to see [what was] in fact intended by the Framers of the Fourth Amendment," the majority in *Robinson* turned to that evidence and found that it "tend[s] to support the broad statement of the authority to search incident to arrest found in the successive decisions of this Court." This is the case, for if one looks to the "original understanding" of those who framed and adopted the Fourth Amendment, as reflected by the great cases of the early 1760's, it appears that the warrantless search incident to arrest was not a matter of concern.[27]

26. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); and Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), are all of a kind, for in each of these cases the arrest was made upon reasonable grounds to believe that the suspect was presently in possession of narcotics. The grounds for arrest thus also established probable cause for search and in none of the three cases does it appear that the search was more intrusive than necessary to find the narcotics.

Similarly, in Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), where the concern was with an administrative arrest by I.N.S. agents preliminary to deportation, the search in question was merely into Colonel Abel's sleeve for articles an officer saw him "deliberately trying to hide." Thus, the search was limited in scope and, given Abel's furtive conduct, appears to have been made on probable cause that either a weapon or proof of alienage would be found. Likewise, in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), involving the taking of a blood sample from a defendant driving while intoxicated, the Court emphasized that "the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol" and that the intrusion was reasonably limited to that necessary "to measure petitioner's blood-alcohol level." And more recently, in Peters v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), where the defendant was arrested by an officer who reasonably believed he had just attempted a burglary, the Court stressed that the officer "did not engage in an unrestrained and thorough-going examination of Peters and his personal effects," but instead made a limited search for weapons.

27. T. Taylor, supra note 15, at 39, notes: "[I]t is as plain as plain can be that these litigations involved searches under the authority of warrants, and that none of the parties was at all concerned about warrantless searches incident to arrest. The stream of practice for the latter flowed from an independent source, wholly unbroken by the rocks of controversy or litigation. * * *

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28. T. Taylor, supra note

29. Ibid.

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Yet, it seems that Justice Rehnquist too readily accepted the "original understanding" evidence as bearing heavily upon the question of how the current "general authority" to search incident to arrest should be expressed. For one thing, this pre-Fourth Amendment arrest and search "practice which was taken for granted"[28] would seem, much more so than is true today, to have been limited generally to searches on probable cause. As Professor Taylor informs us: "Those were simple times, and felons were ordinarily those who had done violence or stolen property. Whether the chase was in hot pursuit, by hue and cry, or by a constable armed with an arrest warrant, the object was the person of the felon, and the weapon he had used or the goods he had stolen."[29]

More importantly, as Professor Amsterdam has aptly noted, it is necessary to distinguish "between the use of background history to establish that the framers of the Bill of Rights meant to limit or forbid a particular evil, and the use of background history to support the negative inference that they did not."[30] Moreover:

> Growth is what statesmen expect of a Constitution. Those who wrote and ratified the Bill of Rights had been through a revolution and knew that times change. They were embarked on a perilous course toward an uncertain future and had no comfortable assurance what lay ahead. To suppose they meant to preserve to their posterity by guarantees of liberty written with the broadest latitude nothing more than hedges against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas seems to me implausible in the extreme.[31]

It is fair to say, then, that neither the prior decisions of the Supreme Court nor the "original understanding" evidence conclusively establishes whether the "general authority" to search the person incident to arrest is "unqualified." Given this existing uncertainty, it is unfortunate that Justice Rehnquist did not give closer attention to the question of whether such a broad search-incident-to-arrest rule is warranted. It is thus appropriate to return to the possible limitations upon the "general authority" to search incident to arrest, with a view to assessing the extent to which they may be said to express the necessary concomitants of a "reasonable" search. These limitations, again, are (1) a requirement of probable cause that the objects sought are on the person of the arrestee, and (2) a requirement that the search extend only so far as is necessary to find those objects, both of which might be applied whether

federal and early state constitutions had in mind warrantless searches incident to arrest. If there was any 'original understanding' on this point, it was that such searches were quite normal and, in the language of the fourth amendment, 'reasonable.' "

28. T. Taylor, supra note 15, at 28.

29. Ibid.

30. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 397–98 (1974). "Indisputably the 'searches and seizures' on the agenda at the time the fourth amendment was written were the rummagings of the English messengers and colonial customs officers. We can reconstruct with some fair confidence what 'the framers' thought of those. It is illusory to suppose that we can know what they thought of anything else. Nothing else was then in controversy." Id. at 398.

31. Id. at 399.

the underlying rationale of the search is to discover (i) fruits, instrumentalities or other evidence of the crime, or (ii) a weapon or other implement which could be used to escape from custody.

(c) Rationale: search for evidence. If the police wish to search a house for evidence of a crime, they must have a search warrant,[32] and to be valid that warrant must be issued upon an affidavit which establishes probable cause that particularly identified items of evidence are to be found in those premises.[33] Similarly, even if the circumstances are such that the police are excused from the necessity of having a search warrant for an automobile, they are nonetheless authorized to conduct a search of a vehicle for evidence only if they possess probable cause that particular items of evidence are presently concealed therein.[34] The Fourth Amendment also protects the right of the people to be "secure in their persons," and thus it might be contended that by a parity of reasoning a person may be searched for evidence of crime only if there is probable cause to believe that individual has in his immediate possession particularly identifiable items of evidence.[35] This should be no less so, the argument proceeds, when the person has first been arrested, just as it is no less so as to a house or auto when an arrest has occurred there.[36] So stated, the argument is not without appeal, and one might even express surprise that this position has been articulated so infrequently in the decided cases.[37]

But it is well to note the likely impact of this proposed limitation. Some have suggested that it would be of less than major significance; it has been said, for example, that "ordinarily, if the police have probable cause for an arrest, they will also have probable cause to search for evidence of the alleged crime."[38] However, even putting aside those arrests for offenses which could not conceivably have any evidence, it is doubtful that this is the case. Probable cause to search involves substantially different considerations than probable cause to arrest,[39] as illus-

32. Except under narrowly defined exigent circumstances. See § 6.5.

33. See § 3.7(d).

34. See § 7.2(c).

35. This is certainly true if a search warrant is obtained for the search of a person not arrested, as is authorized by the law of some jurisdictions. See § 4.5(e).

36. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (house); Thompson v. State, 488 P.2d 944 (Okl.Crim.App.1971) (*Chimel* requires same result as to car). The rule as to vehicles changed in the post-*Robinson* era; see § 7.1(c).

37. The plurality opinion in United States v. Robinson, 471 F.2d 1082, 1095 (D.C.Cir.1972), is a rare exception, for it states that "the search must be directed toward finding evidence which the arresting officer has probable cause to believe will be found on the person." See also the dissent in United States v. Simpson, 453 F.2d 1028 (10th Cir.1972).

38. Note, supra note 17, at 444. "For most crimes, of course, it is clearly reasonable to assume that the arrestee will be in possession of the fruits, instrumentalities or other evidence of the crime for which the person was arrested." United States v. Robinson, 471 F.2d 1082, 1094 (D.C.Cir.1972).

39. "Although it would appear that the conclusions which justify either arrest or the issuance of a search warrant must be supported by evidence of the same degree of probity, it is clear that the conclusions themselves are not identical. In the case of arrest, the conclusion concerns the guilt of the arrestee, whereas in the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location." Comment, 28 U.Chi.L.Rev. 664, 687 (1961). See § 3.1(b).

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trated by the not uncommon holding that a search warrant to search the premises of one known to have engaged in criminal conduct there is invalid because of an absence of a showing that the evidence probably would still be there at the time the search warrant was issued.[40] Except for arrests made in hot pursuit or for offenses committed in the presence of the arresting officer, this same exceedingly difficult question of when the probable cause information has become "stale" would confront the officer. And this would occur in no small number of cases. A study conducted for the President's Commission on Law Enforcement and Administration of Justice found that 45 percent of all arrests occur more than a day after the crime, and nearly 35 percent after the passage of over a week.[41] Given the obvious fact that probable cause to believe an individual has evidence of a prior crime on his person will ordinarily dissipate much faster than probable cause to believe he has that evidence in his home or car, it seems clear that most of those arrests would present real and substantial uncertainties on the probable cause to search issue.[42]

This is not to suggest that there will be no probable cause problems with that 50 percent of all arrests which are made within two hours of the crime as a result of a "hot" search of the crime scene or a "warm" search of the general vicinity of the crime.[43] To be sure, certain on-the-spot arrests, such as for a sale of narcotics just witnessed by the arresting officer, would pose no problem. However, in many cases it cannot really be said that there is probable cause to search for specific items of evidence, as the police at that point will not really have any specific items in mind. If the police are called upon to respond quickly to a report of a crime victim or witness or even to take action upon the basis of their own observations, detailed information about the precise manner or extent of the criminal activity is likely to be lacking. Even though the police have probable cause to arrest, it does not necessarily follow that they know the particular crime which has been committed,[44]

40. See § 3.7(a).

41. President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology 96 (1967).

42. Consider, for example, whether there was probable cause to search the defendant for evidence in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Although the burglary for which Chimel was arrested involved the stealing of several rare coins, the kind of objects which could be concealed on the person, the burglary had occurred a month prior to the arrest and the police knew that Chimel had told an acquaintance that he had already parted with the coins.

43. President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology 96 (1967).

44. Model Code of Pre-Arraignment Procedure § 120.1(2) (1975), provides: "An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer is unable to determine the particular crime which may have been committed." The commentary thereto states:

"Although an explicit provision to the effect is novel, there appears to be no ground in principle or authority that would justify requiring an arresting officer to be able to identify the precise crime for which he is arresting. * * * If an officer, who has received a call to investigate a report of a serious disturbance, sees a dishevelled man in blood-stained clothing flee from the area to which the officer has been called, there may be no way of knowing at that time whether the crime, if any, which has been committed, was a rape, a robbery, or a

and even if they do they may nonetheless have little or no idea what instrumentalities, if any, were used in committing the crime, whether the criminal activity proceeded far enough to result in the person acquiring fruits, and generally whether there exists anything else of likely evidentiary value which could be concealed on the person.

While that dilemma is most serious as to on-the-spot arrests, it will often exist as well in the case of arrests for past criminal conduct. Notwithstanding intervening investigation, it will often be true that the most that can be said is that there may be some kind of evidence somewhere concerning that crime, but its precise nature or location will be doubtful at best. For example, if an individual is arrested because it is known he has acted as a contact man for an abortionist in the past, can it really be said that the search of his wallet which uncovers a business card with a message on it about an abortion was made on probable cause that some specifiable item connected with his criminal conduct was there?[45] Or, if a person is arrested on reasonable grounds to believe that some two weeks earlier he possessed and transported explosives with intent to commit a crime, could it really be said that documents found on his person indicating he had conspired with others concerning the intended use of the explosives were found in a search based on probable cause to believe such evidence of the crime was to be found on his person?[46] Certainly the answer is no in both cases.

It seems clear beyond question, then, that a limitation on the "general authority" to search a person incident to arrest stated in terms of a requirement that a search for evidence could be undertaken only upon probable cause that *particular* items of evidence are *presently* to be found on the person, would in practice regularly confront arresting officers with the most difficult of decisions. We do not hesitate, of course, to require precisely that kind of decision to be made to justify the search of a house or vehicle, and thus it is appropriate to ask whether there are good reasons for not imposing a comparable requirement as to searches of the person. It may be concluded that there are, and that consequently the "general authority" of the police to search an arrested person for evidence should not be qualified by a requirement that there be established, on a case-by-case basis, probable cause that such evidence would be found.

The basic premise is that Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities[47] and thus ought to be expressed in

murder. A stop may sometimes clarify the situation, but it would be undesirable to require, as a condition of taking the person into custody, that the officer discover precisely what sort of serious criminality that person may have been involved in." Id. at 136.

45. See People v. Kalpak, 10 Ill.2d 411, 140 N.E.2d 726 (1957), involving such a discovery.

46. See United States v. Simpson, 453 F.2d 1028 (10th Cir.1972), speculating that such items were the object of the search in which evidence of another offense was discovered.

47. As the Supreme Court has reiterated, the exclusionary "rule is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a

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terms which are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.[48] A highly sophisticated set of rules, qualified by all sorts of ifs, ands and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."[49]

If the rules are impossible of application by the police, the result may be the sustaining of motions to suppress on Fourth Amendment grounds with some regularity, but this can hardly be taken as proof that "the people" are "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[50] Rather, that security can only be realized if the police are acting under a set of rules which, in most instances, make it possible to reach a correct determination *beforehand* as to whether an invasion of privacy is justified in the interest of law enforcement. In short, we must resist "the understandable temptation to be responsive to every relevant shading of every relevant variation of every relevant complexity" lest we end up with "a fourth amendment with all of the character and consistency of a Rorschach blot."[51]

Such a result may be avoided if certain search and seizure rules are expressed in terms of "standardized procedures" or a "set routine,"[52] that is, if there are some rules which "will be applied to all cases of [a certain] type, regardless of particular factual variations,"[53] in lieu of more sophisticated but less precise rules requiring ad hoc decision-making by both police and courts.[54] Such an approach seems particularly

personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

48. See LaFave, Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police, 30 Mo.L.Rev. 566 (1965).

For suggestions as to how the Supreme Court could best achieve this result, see Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind.L.J. 329 (1973). As to the limitation on the Court's ability to do so, see Amsterdam, supra note 30, at 350–55.

49. United States v. Robinson, 471 F.2d 1082, 1122 (D.C.Cir.1972) (Wilkey, J., dissenting).

50. It is well to keep in mind that the Amendment is best viewed as a "regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure," rather than "a collection of protections of atomistic spheres of interest of individual citizens." Amsterdam, supra note 30, at 367. See also note 47 supra.

51. Amsterdam, supra note 30, at 375.

52. United States v. Robinson, 471 F.2d 1082, 1115, 1122 (D.C.Cir.1972) (Wilkey, J., dissenting).

53. Griswold, Search and Seizure—A Dilemma of the Supreme Court (Roscoe Pound Lectures, delivered at University of Nebraska College of Law, March 18–19, 1974).

54. As I have elsewhere suggested, "the rules governing search and seizure * * * are more in need of greater clarity than greater sophistication." For example, if the question is "when a warrantless entry of premises to arrest should be permitted," it would seem that a "test which requires a weighing and balancing of a multitude of factors and considerations * * * might be 100 percent perfect in the theoretical sense, in that all truly exigent circumstances are included and all other instances are distinguished in one way or another," but "if it is so difficult to comprehend or apply in practice that officers acting with the best intentions could guess right on the meaning of the test only about 75 percent of the time,

appropriate as to those forms of police action which involve relatively minor intrusions into privacy, occur with great frequency, and virtually defy on-the-spot rationalization on the basis of the unique facts of the individual case.

The search of an arrested person for evidence is precisely that kind of police activity. Firstly, search incident to arrest is by far the most common variety of police search practice,[55] and it occurs under an infinite variety of circumstances. Secondly, requiring the police to make probable-cause-for-search decisions in each case would involve them in the most recondite of matters. The prior decision that there were grounds for arrest, complex as it may be in certain instances, is child's play compared to determining whether there are also grounds in the individual case to search for evidence. The arrest decision requires only a determination of whether it is probable that the individual has engaged in criminal activity, but an additional decision on grounds to search, as noted earlier, would require the officer largely to speculate about what might exist that could be characterized as evidence of the crime and, in many cases, what likelihood exists that those items are still in the possession of the arrestee.

Thirdly, the decision to search an arrestee's person cannot be made with the degree of forethought and reflection possible for most other search decisions. The circumstances calling for a decision arise from the arrest itself, which is often unanticipated. And the fact of arrest gives rise to an immediate need to reach a search decision, for as of the moment of arrest the arrestee is motivated to conceal, destroy or furtively abandon any incriminating evidence. By contrast, a decision as to whether there are grounds to search a dwelling or vehicle for evidence may ordinarily be made in circumstances affording a greater opportunity for marshalling and weighing all of the appropriate facts.[56]

Finally, it is not irrelevant that a search of the person, while more than a "petty indignity,"[57] is a "totally different thing * * * from ransacking his house for everything which may incriminate him."[58] Thus, one need not question the *Chimel* ruling that a house search cannot be characterized as a "relatively minor" intrusion attending an arrest therein to conclude that search of the person need not be as firmly

then it would seem better to have a simpler rule which is theoretically correct ninety-five out of one hundred cases but understandable in its application to virtually all cases." LaFave, Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire," 8 Crim.L.Bull. 9, 30 (1972).

55. See note 15 supra.

56. The decision as to whether there is probable cause to search a dwelling is made in the context of acquiring a search warrant, which is by its nature generally a less hurried and hectic process than an on-the-street arrest. Also, in many of these cases the defendant is either in custody or is unaware that the police are on his trail, and thus there is time to evaluate the evidence at hand and to seek out additional facts in case of doubt. Similarly, in most search-of-vehicle cases the driver has previously been arrested, and thus the police may hold the car while they carefully consider the probable cause issue or undertake to gather a more complete picture of the prior events bearing upon the probable cause question.

57. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

58. United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir.1926).

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61. United States v. Robin
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62. T. Taylor, supra note 1

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circumscribed. Even without a case-by-case determination of the grounds for search of the person incident to arrest, these searches by definition are permissible only against those as to whom there exists grounds to take the more serious step of arrest,[59] the "initial stage of a criminal prosecution [which] is inevitably accompanied by future interference with the individual's freedom of movement."[60]

If it is true that the "general authority" to make an evidentiary search of the person incident to arrest flows directly from the antecedent lawful arrest, without a specific determination that the discovery of such evidence is probable, then it follows that it is incorrect to say that such a search may be "no more intrusive than necessary to recover such evidence."[61] To state it another way, once it is conceded that an evidentiary search incident to arrest "is not for specific, predesignated articles,"[62] then there does not exist any particular item which is the necessary object of the search. Consequently, no part of the area to be searched is logically excluded as a possible place of concealment, and there is thus no practicable basis for making a judgment as to what degree of search is too intrusive.[63] So too, if after the fact the defendant's arrest is upheld because of probable cause as to an offense other than relied upon by the officer at the time of arrest, that has no effect upon the lawfulness of the search incident to arrest.[64]

Admittedly, the conclusion that the "general authority" to make evidentiary searches of arrestees is "unqualified" is not so self-evident as to be beyond dispute. It merits note, however, that there is no evidence of disagreement with this conclusion in the *Robinson* dissent, and that the dissenters in that case had theretofore expressed their understanding of the "general authority" in similar terms.[65] Lower courts, in

59. By contrast, a search warrant "may issue to search the premises of anyone, without any showing that the occupant is guilty of any offense whatever." T. Taylor, supra note 15, at 48–49. See also note 39 supra.

60. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

61. United States v. Robinson, 471 F.2d 1082, 1094 (D.C.Cir.1972).

62. T. Taylor, supra note 15, at 49.

63. Ball v. United States, 803 A.2d 971 (D.C.App.2002) (search incident to arrest may include opening closed container, here a pill bottle); Wright v. State, 418 So.2d 1087 (Fla.App.1982) (search of film container lawful without regard to its size).

Items on the person such as wallets may also be subjected to warrantless search incident to arrest, and are not covered by the *Sanders* rule discussed in § 5.5. See, e.g., State v. Lewis, 220 Conn. 602, 600 A.2d 1330 (1991) (search of wallet permissible, as search incident to arrest theory "allows the complete search of a suspect"); Klopfenstein v. State, 439 N.E.2d 1181 (Ind.App. 1982) (search of pill bottle on person not governed by *Sanders*); State v. Hlady, 43 Or.App. 921, 607 P.2d 733 (1979) (search of defendant's wallet incident to arrest; *Sanders* not applicable, as it "did not involve a search of a closed container found on defendant's *person* pursuant to his lawful custodial arrest").

64. United States v. Bookhardt, 277 F.3d 558 (D.C.Cir.2002) ("When an officer does take a defendant into custody, the historical justifications for the search-incident-to-arrest exception apply regardless of whether the officer articulates the wrong reason for making the arrest," and thus the lower court erred in concluding the search limitations of Knowles v. Iowa, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998), discussed in § 5.2(e), apply).

65. All three dissenters (Marshall, Douglas, and Brennan) were members of the majority in *Chimel*, wherein searches incident to arrest were characterized as "searches not justified by probable cause."

In Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973), the

applying *Robinson,* have deemed evidentiary searches of an arrested person to be virtually unlimited.[66] However, in a case in which the on-the-scene search incident to arrest is highly unusual in its intrusiveness, it may be deemed unreasonable because that intrusion lacks justification, as where there is clearly no evidence (and no weapon) to look for.[67]

Court upheld the warrantless taking of fingernail scrapings from a defendant who could have been (but was not) lawfully arrested for the strangulation murder of his wife and who was observed by the police attempting to conceal and remove what appeared to be blood under his fingernails. Justice Marshall, concurring, expressed the view that "when a person is detained, *but not arrested,*" the intrusion must be limited to that necessary to obtain the specific item of evidence as to which the police had probable cause, but that the defendant could have been searched more "extensively * * * had an arrest occurred" notwithstanding the fact that "the police had no reason at all to believe that Murphy had on his person more evidence relating to the crime." In the same case, Justice Douglas observed that "suspicion has never been sufficient for a warrantless search, save for the narrow situation of searches incident to an arrest." As for Justice Brennan, in his majority opinion in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), he concluded that "intrusions beyond the body's surface" (there, the taking of a blood sample) were more than ordinary searches incident to arrest and thus could not be undertaken "on the mere chance that desired evidence might be obtained," but rather required "a clear indication that in fact such evidence will be found."

Yet, some uncertainty as to their position exists because of United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), where the majority held that once an accused has been lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of arrest may be searched and seized without a warrant even after a substantial lapse between the arrest and booking and the seizure of the property. The three *Robinson* dissenters joined Justice Stewart's dissent, taking the position that because of the time of the search it was not incident to arrest and thus a warrant was required. There would seem to be no point in requiring a warrant unless the search may be made only on probable cause, and it is unclear why probable cause should be required during custody if it is unnecessary at the time of arrest. Some distinction must exist, however, in the mind of Justice Stewart, for he expressed no disagreement with the *Robinson* conclusion that a search incident to arrest could be made without regard to "the probability in a particular arrest situation that * * * evidence would in fact be found."

66. As stated in United States v. McFarland, 633 F.2d 427 (5th Cir.1980):

"McFarland next claims that the seizure of the piece of notebook paper from his shirt pocket was the product of an impermissibly broad search incident to arrest since the arresting officer was not aware of the existence or the incriminating nature of the piece of paper until he seized it from McFarland and read it. This contention is frivolous. The purpose of the doctrine permitting searches incident to arrest is to allow discovery and preservation of destructible evidence like this piece of paper. * * * Moreover, the validity of the search does not depend on any probability that such evidence will be found; a full search incident to arrest is reasonable and permissible under the Fourth Amendment."

67. In Amaechi v. West, 237 F.3d 356 (4th Cir.2001), an officer obtained an arrest warrant for plaintiff's arrest because she had played music in her townhouse at such a level as to disturb her neighbors. The warrant was executed at 9 p.m., when plaintiff was preparing for bed, and she slipped a house dress over her naked body before answering the door. The police refused her request that she be allowed to put on additional clothing, handcuffed her notwithstanding her objection that she would be unable to keep her dress closed, and then conducted a search inside her dress, touching her genitals in the process. In defending against a § 1983 action, the claim was made that because *Robinson* allows a "full search of the person" the search in the instant case was constitutional. The court correctly disagreed, noting that *Robinson* did not "hold that all searches incident to arrest, no matter how invasive, are inherently reasonable," and that, instead, the Supreme Court had indicated otherwise in Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983), stating "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street." The

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(d) Rationale: search for weapons. It is sometimes argued that search for weapons incident to arrest should be limited to those instances in which the arresting officer has "reasonable cause to believe that a suspect is armed."[68] Here, the analogy is to the stop-and-frisk cases, the only other major area of police activity in which searches for self-protection are undertaken on a regular basis.[69] In *Terry v. Ohio,*[70] the Court held that an officer could engage in a protective search incident to a "street encounter" for investigation only if he was led "reasonably to conclude * * * that the persons with whom he is dealing may be armed and presently dangerous." So the argument goes, if (as stated in *Terry*) a search must be "justified at its inception," then it is not merely the fact of arrest but only additional evidence showing the arrestee is probably armed which justifies a search for weapons.

Even if one were inclined to require probable cause for an evidentiary search, it in no sense follows that reliance on *Terry* compels the conclusion that probable cause is also required for a weapons search.[71] The basic point is that

> unlike the momentary and relatively minor dangers presented in the stop-and-frisk situation * * *, the dangers to which the police are exposed in the circumstances of a custodial arrest are sharply accentuated by the prolonged proximity of the accused to police personnel following the arrest. * * * [T]he crucial distinguishing feature of the in-custody arrest "is not the greater likelihood that a

court in *Amaechi* then held the search violated the Fourth Amendment because it was "highly intrusive without any apparent justification," as it was clear that the plaintiff was not armed and that there was no evidence of the 2–day-old noise violation plaintiff could have destroyed.

In People v. More, 97 N.Y.2d 209, 738 N.Y.S.2d 667, 764 N.E.2d 967 (2002), defendant was arrested in an apartment for drug use and then was taken into the bedroom for a strip search, where police removed from his rectum a plastic bag found to contain cocaine. Noting that Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), held a routine search incident to arrest did not extent to the taking of a blood sample, the court held that "body cavity searches incident to arrest are at least as intrusive as blood test procedures," and thus was "unreasonable and invalid" in the instant case because there was no showing "of exigent circumstances to justify dispensing with the warrant requirement," as there was no testimony that "an immediate body cavity search was necessary to prevent his access to a weapon or prevent his disposing of the drugs." The court emphasized its ruling did not extent to "body cavity searches conducted at the station house," discussed in § 5.3(c).

Compare United States v. Williams, 209 F.3d 940 (7th Cir.2000) (search incident to arrest which included reaching inside defendant's pants and undershorts and seizing plastic bag from buttocks area deemed "not overly intrusive"; court emphasizes prior consensual frisk had already identified contents of bag as contraband, and that defendant "was never disrobed or exposed to the public," as the "search occurred at night, away from traffic and neither officer saw anyone in the vicinity").

68. Note, 69 Colum.L.Rev. 866, 870 (1969).

69. Searches for self-protection are sometimes undertaken incident to the execution of a search warrant, but this type of problem appears to be subject to resolution by analysis roughly comparable to that in the stop-and-frisk cases. See § 4.9(d).

70. 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

71. In Note, supra note 17, and the plurality opinion in United States v. Robinson, 471 F.2d 1082 (D.C.Cir.1972), the position is taken that probable cause is required to initiate a search for evidence but not a search for weapons, presumably on the ground that such a restriction may only result in the nondiscovery of some evidence in the former case but could have much more serious consequences in the latter.

> person taken into custody is armed, but rather the increased likelihood of danger to the officer *if* in fact the person is armed." * * * With this increased danger in mind, it would seem clearly unreasonable to expect a police officer to place a suspect in his squad car for transportation to the stationhouse without first taking reasonable measures to insure that the suspect is unarmed.[72]

Although there is some pre-*Robinson* authority to the contrary,[73] the position stated above is sound, for certainly "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."[74] Even the *Robinson* dissenters, who find the majority opinion "at odds" with the "long tradition of case-by-case adjudication of the reasonableness of searches and seizures," would not require a case-by-case determination of the probability that the arrestee is armed.[75] On this notion that a "search is valid under *Robinson* * * * simply because custodial seizures on any ground inherently pose a danger,"[76] a *Robinson* search is also justified in the case of apprehension of juveniles.[77]

The more difficult question concerns the permissible intensity of a weapons search; in the language of the above quotation, what are "reasonable measures to insure that the suspect is unarmed"? Once again, one position is that the answer is provided by *Terry*, namely, that the officer may only "conduct a carefully limited search of the outer clothing * * * in an attempt to discover weapons which might be used to assault him," and may go beyond this "limited patting of the outer clothing" only "when he discover[s] such objects."[78] Although the issue is a close one, it does seem doubtful whether the "general authority" to search arrestees for weapons should be stated in such limited terms.

In *Terry*, the Court described in some detail the police procedures for a frisk, which include "a thorough search * * * of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."[79] This is an

72. United States v. Robinson, 471 F.2d 1082 (D.C.Cir.1972).

73. See, e.g., People v. Superior Court, 7 Cal.3d 186, 101 Cal.Rptr. 837, 496 P.2d 1205 (1972); State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971); People v. Marsh, 20 N.Y.2d 98, 281 N.Y.S.2d 789, 228 N.E.2d 783 (1967). All were traffic violation arrests, and it is unclear how seriously these courts would take their probable cause requirement in other circumstances. Citing these cases, the plurality in United States v. Robinson, 471 F.2d 1082, 1107 n. 43 (D.C.Cir.1972), noted that its decision "offers considerably greater protection to the officer than do [those] decisions."

74. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

75. And thus it is hardly surprising that courts have rejected the argument that the failure of the police to utilize their *Terry* frisk powers in the detention immediately preceding the arrest precludes a search incident to arrest. United States v. Goddard, 312 F.3d 1360 (11th Cir.2002).

76. In re J.O.R., 820 A.2d 546 (D.C.App. 2003).

77. In re Humberto O., 80 Cal.App.4th 237, 95 Cal.Rptr.2d 248 (2000) (truant); In re J.O.R., 820 A.2d 546 (D.C.App.2003) (execution of neglect custody order); State in Interest of R.D., 749 So.2d 802 (La.App. 1999) (truant); Brown v. Ashton, 93 Md. App. 25, 611 A.2d 599 (1992), vacated on other grounds, 339 Md. 70, 660 A.2d 447 (1995) (curfew violation); State in Interest of J.G., 227 N.J.Super. 324, 547 A.2d 336 (1988) (juvenile involved in family dispute).

78. The latter language is from the companion case of Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

79. Quoting Priar & Martin, Searching and Disarming Criminals, 45 J.Crim.L.C. & P.S. 481 (1954).

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unduly broad description of the frisk which is necessary incident to a stopping for investigation, where "the need is only to find implements which could readily be grasped by the suspect during the brief face-to-face encounter."[80] The description overstates the standard procedure employed in a protective search incident to a stopping for investigation,[81] but it also understates the standard procedure utilized in the search of an individual who is to be taken to the station.[82] It is appropriate to inquire, therefore, whether the practice described in *Terry* is in fact sufficient to foreclose the "unnecessary risks" which attend "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station."[83]

In discussing searches for evidence, it was noted that if an evidentiary search need not be limited to predetermined objects it would be extremely difficult to impose practical limits upon the scope of the search. Somewhat the same problem exists here. The purpose of the search, in the words of the Supreme Court in *Robinson,* is to find "*any* weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape." "Any weapons," it would seem, is not limited to bulky guns and knives which could be readily detected in a patdown, nor to those weapons to which the arrestee has immediate access in the outer areas of his clothing. As even the *Robinson* dissenters acknowledge:

> If the individual happens to have a weapon on his person, he will certainly have much more opportunity to use it against the officer in the in-custody situation [than in a *Terry* type of case]. The prolonged proximity also makes it more likely that the individual will be able to extricate any small hidden weapon which might go undetected in a weapons frisk, such as a safety pin or razor blade. In addition, a suspect taken into custody may feel more threatened by the serious restraint on his liberty than a person who is simply stopped by an officer for questioning, and may therefore be more likely to resort to force.[84]

If, then, under the *Terry* rule "an officer may not remove an object from the suspect's pockets unless he has reason to believe it to be a dangerous weapon," that limitation is unduly strict in the case of a

80. LaFave, "Street Encounters" and the Constitution: *Terry, Sibron, Peters,* and Beyond, 67 Mich.L.Rev. 39, 91 (1968).

81. See Pilcher, The Law and Practice in Field Interrogation, 58 J.Crim.L.C. & P.S. 465, 488 (1967), noting that the police normally pat down only around the armpits and pockets during a stopping for investigation.

82. See L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime 141, 146 (1967).

83. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

84. As the *Robinson* dissenters note, this was the interpretation given *Terry* by the plurality in the Court of Appeals. Actually, *Terry* is less than clear on this point. The statement of the holding, namely, that under appropriate circumstances the officer "is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing," is ambiguous, although the Court earlier notes that with respect to suspect Terry the officer "did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons" and that as to suspect Katz "he never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat down which *might have been a weapon.*" (Emphasis added.)

weapons search incident to arrest. Rather, it would seem that an object not clearly identifiable as something other than a "small hidden weapon" must be amenable to further inspection.[85] And if the object is a container which might have some kind of weapon within it, it seems reasonable that the officer should look inside of that object, as the Supreme Court appears to have decided in *Peters v. New York*.[86] The alternative, requiring the officer to retain all such objects without inspecting them, is less than practicable.[87]

If the "general authority" to search an arrestee for weapons must extend this far, then it is very doubtful whether any realistic intensity limitation upon such searches is feasible. Moreover, any such limitation would appear to be of little significance whenever the searching activity may be justified upon additional grounds, such as to obtain evidence[88] or to ensure the security of a custodial facility.[89] But there nonetheless may occur on-the-scene searches of the person that are so extreme in their intrusiveness as to be unreasonable because without any justification in terms of searching for weapons (or evidence).[90]

(e) Minor offenses and the pretext problem. There remains for consideration the additional conclusion in *Robinson* that there is no reason "to qualify the breadth of the general authority" in the case of

85. The *Robinson* dissenters note the arguments in favor and against such a conclusion, but find that they need not "solve this balancing equation in this particular case" because they conclude that the officer's subsequent conduct in looking into the cigarette package was improper.

86. 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968). An off-duty policeman arrested Peters in an apartment building for attempted burglary, and then proceeded to search him. The officer felt a hard object in patting down Peters, and then removed from Peters' pocket an "*opaque* plastic envelope," which he inspected and found burglar's tools. (Emphasis added.) The Court held this to be a valid search incident to arrest "primarily for weapons."

87. This alternative "position would require the officer to retain all confiscated containers in his own possession throughout the trip to the stationhouse following a custody arrest. In a typical street encounter a single officer might well have to cope with wallets, purses, cigarette packages, envelopes, and a myriad of other items. Moreover, should officers other than the arresting policeman provide transportation to the stationhouse, this procedure would require some potentially cumbersome system of accountability to guard the police against claims of loss." Note, 59 Va.L.Rev. 724, 740 (1973).

88. The point is that while search for weapons and for evidence are separately discussed here, in practice many searches will be undertaken for both purposes. Thus, in United States v. Robinson, 471 F.2d 1082, 1095 (D.C.Cir.1972), the plurality would not impose its frisk limitation whenever a search is made for evidence, for in such a case the officer may "also use this reasonable intrusion to look simultaneously for weapons."

Sometimes this "piggy-back" justification is stated the other way around, as in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966): "once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone."

89. This, of course, is not a basis for search incident to arrest, but rather for search incident to jailing, which may not occur following every arrest. See note 17 supra. But in those categories of cases in which station-house release is not possible, "we cannot say that an accused may be thoroughly searched for a second time at the station-house, but not pending the arrival of the patrol wagon. No right to privacy would be enhanced by such a position." Charles v. United States, 278 F.2d 386, 389 n. 2 (9th Cir.1960).

90. See the *Amaechi* case, note 67 supra.

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92. As in *Chimel*. See no

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94. United States v. Rob
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arrests for minor traffic violations. For what reasons might one feel inclined to think differently about searches incident to arrest for minor traffic violations? For one thing, there is with rare exception[91] quite obviously no evidence whatsoever connected with the offense and thus a total absence of any justification to make an evidentiary search. It is one thing, it might be said, to permit a search on even a remote chance that the arrestee might possess evidence of the crime,[92] but quite another to permit such a search when there clearly could be no evidence. But because a search for evidence is only one of the two reasons for search of an arrestee, this distinction standing alone does not separate out the minor traffic violation cases, except for those who view the right to make a full weapons search as somehow "piggybacked" onto the right to search for evidence.[93]

This obviously leads to the question of whether the traffic cases should be deemed outside the "general authority" because of some marked difference in the need to search for weapons. This is the only possible basis of distinction entertained by the *Robinson* majority, but they were unwilling to accept the "assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes." That observation is somewhat misleading, for one would expect that persons arrested for minor traffic violations, as a class, are less likely to be armed than those arrested for some other crimes, say, burglary.

Yet it is well to remember that in a particular case a policeman is not dealing with a class of offenders, but rather one particular offender, and when that person "stands before the officer, he contains a potential for danger, quantum unknown."[94] The fact that it may be fair to assume that traffic offenders, as a class, are not as frequently armed as burglars really tells the officer nothing about whether defendant Robinson poses a greater or lesser risk than defendant Chimel.[95] And to expect the arresting officer to somehow divine which traffic offenders are most likely to be armed by reference to some "special circumstances,"[96] such

91. *Robinson* might have been an exception had the license revocation not occurred more than five years earlier. The government conceded that because of that fact, of which the officer was aware, there was nothing to the argument made earlier that there was an evidentiary basis for the search because "notices of permit revocation are normally sent to offending drivers, and finding such a notice in appellant's possession would have been probative of his knowing commission of the crime for which he was arrested."

92. As in *Chimel*. See note 42 supra.

93. See note 88 supra.

94. United States v. Robinson, 471 F.2d 1082 (D.C.Cir.1972) (Wilkey, J., dissenting).

95. Robinson may well have appeared to present a greater danger. His offense suggests "the possibility that the suspect may have other strong reasons for wanting to avoid police custody," ibid., and the arrest occurred at 11 p.m. By contrast, the police knew Chimel to be a rather unusual character who had been playing cat-and-mouse with them for some weeks concerning his responsibility for the burglary of a coin shop. He had made no effort to flee, and was arrested by the police upon his return home from his regular employment.

96. A number of courts have held that a traffic violator may not be searched absent "special circumstances." See cases cited in United States v. Robinson, 471 F.2d 1082, 1103 n. 38 (D.C.Cir.1972). These cases are

as "furtive movements,"[97] seems highly unrealistic[98] and impracticable.[99] In short, the justification for a protective search "is not the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer *if* in fact the person is armed."[100]

Thirdly, such offenses as minor traffic violations might be thought to merit separate attention because persons arrested for such offenses are rather routinely afforded the opportunity to obtain their release once they have been processed at the stationhouse. But, while this means that the right to search cannot be bolstered by the fact of an impending full inventory incident to incarceration,[101] it does not change the fact that there is a need to protect the arresting officer from "unnecessary risks in the performance of [his] duties."[102]

There is a much more powerful reason for being concerned about the unquestioned application to traffic violation cases of the "general authority" to search incident to arrest. "There is," as the *Robinson* dissenters properly emphasized, "always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search." Given the fact, as they noted, that "in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer,"[103] and that "very few drivers can traverse any appreciable distance without violating some traffic regulation,"[104] this is indeed a frightening possibility. It is apparent that virtually everyone who ventures out onto the public streets and highways may then, with little effort by the police, be placed in a position where he is subject to a full search. Nor is one put at ease by what evidence exists as

not consistent, however, on the question of whether something short of grounds to arrest for a more serious offense will suffice and, if so, precisely what circumstances are required.

97. On the difficulties in assessing so-called "furtive movements," see People v. Superior Court, 3 Cal.3d 807, 91 Cal.Rptr. 729, 478 P.2d 449 (1970).

98. The danger is that, unknown to the officer, the traffic violator is wanted for some more serious offense and fears that his connection with that offense will be discovered prior to the time he gains his release. There is unlikely to be anything observed by the officer which indicates the degree of this danger in a particular case.

99. The problems are comparable to those discussed in the text at note 52 supra.

100. People v. Superior Court, 7 Cal.3d 186, 101 Cal.Rptr. 837, 496 P.2d 1205 (1972) (Wright, C.J., concurring).

101. See § 5.3(a).

102. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

This means that the right to search incident to custodial arrest is not affected by the likelihood that once at the station the defendant will exercise his statutory right to prompt release on interim bail. People v. Chapman, 425 Mich. 245, 387 N.W.2d 835 (1986).

103. "Twenty-eight of the fifty states have no limitations on police discretion to arrest for a traffic offense. In these states, a police officer can decide to arrest for the most minor offense. In the twenty-two states that have legislative limitations, many either retain provisions that give the officer broad discretion or only require the issuance of a citation in a small class of offenses, leaving a great deal of room for police pretext." Salken, The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses, 62 Temple L.Rev. 221, 249–50 (1989).

104. B. George, Constitutional Limitations on Evidence in Criminal Cases 65 (1969 ed.).

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to police practices in this regard; it is clear that this subterfuge is employed as a means for searching for evidence on the persons of suspects who could not be lawfully arrested for the crimes of which they are suspected.[105]

While the *Robinson* majority prefers to "leave for another day" the resolution of this problem, the matter cannot be disposed of so simply; the specter of the pretext arrest looms so large that it *must* be taken into account in formulating a rule to govern such a pervasive police practice as search incident to arrest for traffic offenses. After all, "a paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures."[106] And it has not heretofore taken proof of a subterfuge in the particular case to prompt the Supreme Court to develop a rule to guard against arbitrary searches. The only rational justification for the warrant requirement in *Camara v. Municipal Court*[107] is to diminish the chance of an inspection "based on caprice or on personal spite"[108] or as "a front for the police."[109]

What avenues are open to deal with the pretext arrest problem? The most obvious is to meet it head on, so to speak, by excluding evidence obtained in a search incident to a traffic arrest upon a showing that the arrest was nothing more than "a pretext to search for evidence."[110] But, it is to be doubted whether it is within the ability of trial and appellate courts to determine with any fair rate of success the uncommunicated intentions or expectations of the police officer. As one appellate judge commented in response to *Robinson*:

> Where the defendant is arrested for the violation of a traffic law (as in *Robinson* and *Gustafson*), is the arrest a pretext if the officer also has the suspicion, but not probable cause, to believe that the defendant also has drugs in his possession? If the answer is no, we have, then, the almost unlimited license to make warrantless searches. If the answer is yes, the license will be almost as broad because it will be next to impossible to determine that in making the arrest the police were motivated by the desire to search for evidence of a crime not related to the arrest.[111]

105. This practice has been documented in empirical studies, see, e.g., W. LaFave, Arrest 151 (1965); L. Tiffany, D. McIntyre & D. Rotenberg, supra note 82, at 136; and has surfaced in some appellate decisions, see, e.g., Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir.1968); Taglavore v. United States, 291 F.2d 262 (9th Cir.1961); Diggs v. State, 345 So.2d 815 (Fla.App.1977); State v. Blair, 691 S.W.2d 259 (Mo.1985).

Pretext traffic arrests also occur to facilitate interrogation. Black v. State, 739 S.W.2d 240 (Tex.Crim.App.1987).

106. Amsterdam, supra note 30, at 417.

107. 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). See LaFave, Administrative Searches and the Fourth Amendment: The *Camara* and *See* Cases, 1967 Sup.Ct.Rev. 1, 25.

108. Ohio ex rel. Eaton v. Price, 364 U.S. 263, 80 S.Ct. 1463, 4 L.Ed.2d 1708 (1960).

109. Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960).

110. United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932).

111. State v. Florance, 270 Or. 169, 527 P.2d 1202 (1974) (O'Connell, C.J., dissenting). See also State v. Harris, 286 N.W.2d 468 (N.D.1979) (noting, in rejecting defendant's pretext arrest claim where defendant was arrested for disorderly conduct and found with controlled substances, that the "question of police motivation for a search

The police officer, after all, is "engaged in the often competitive enterprise of ferreting out crime."[112] It is only natural that "when he sees the case law as a hindrance to his primary task of apprehending criminals, he usually attempts to construct the appearance of compliance, rather than allow the offender to escape apprehension."[113] This is not to suggest that the officer will necessarily give what he perceives to be false testimony; if a particular motive is "bad" (in the sense that its existence turns what would otherwise be a valid search into an invalid search), it is not difficult to convince oneself of its nonexistence. Motivation is "a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second."[114]

If the arresting officer does not admit to the "bad" motive, it will often be very difficult for a court to reach some conclusion as to its existence or nonexistence on the basis of other evidence, as the *Robinson* case itself illustrates. Apparently Officer Jenks, after the first stopping of Robinson, checked not only the "traffic records" but also the "criminal records." Because Robinson had two prior narcotics convictions, defense counsel suggested that Jenks was aware of Robinson's criminal record and that the subsequent traffic arrest was a pretext to search for narcotics. Officer Jenks denied that he had any such strategy in mind. It is impossible to reach any conclusion on the pretext issue on these facts, and this would be the case even if Officer Jenks admitted that he was aware of Robinson's two prior convictions. Unless a mere awareness of the possibility of discovering narcotics is to be made the legal equivalent of a motive to search for narcotics, which hardly seems appropriate,[115] the motive question remains imponderable.

is a difficult one"); State v. Tucker, 286 Or. 485, 595 P.2d 1364 (1979) (declaring it not "practical or desirable," when police officer arrests or stops for minor offense but suspects a greater one, to determine the validity thereof "on the basis of the officer's purpose, or primary purpose, in making it").

112. Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

113. J. Skolnick, Justice Without Trial 215 (1966).

114. Amsterdam, supra note 30, at 437.

115. It would be an odd rule that there is a "pretext" situation whenever the police anticipate or even contemplate the possibility of finding evidence of a crime unrelated to that for which the arrest is made. An arrest or search which would have been made even absent such anticipation or contemplation should not be deemed unlawful merely because the officer was unable to maintain a blank mind on the question of what the results of the search might be. As stated in Crews v. United States, 369 A.2d 1063 (D.C.App.1977): "In a case in which the police suspect that an individual has violated two laws, one for which they have probable cause to arrest and one for which they do not, it would be absurd to suggest that they must forego enforcement of the former simply because their primary interest has been the latter." Rather, the "test for determining whether a traffic arrest which is the basis for seizure of evidence of a serious crime is a 'pretext' for the search * * * is whether the facts in the case suggest the strong possibility that the arrest was one which would have been made by a traffic officer on routine patrol against a citizen driving in the same manner or whether the arrest was one which would not have been made but for some other motive of the arresting officer." Diggs v. State, 345 So.2d 815 (Fla.App.1977). For further discussion of this point, see § 1.4(e).

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117. See, e.g., People v.
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Finally, while doubtless there are many cases in which the surrounding circumstances would suffice to establish that the arrest was a pretext,[116] not all courts would reach such a conclusion. Indeed, if the decided cases in this area indicate anything, it is that many courts will uphold a search incident to a traffic arrest in the face of clear evidence of an ulterior motive.[117] Though this was often done in the past by finding the evidence of an ulterior motive lacking, it is now possible that the suppression motion would be denied simply in reliance upon the Supreme Court's assertion in *Scott v. United States*[118] that searches are to be examined "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."[119] Indeed, such a result has been virtually assured as a result of the Supreme Court's unanimous decision in *Whren v. United States*[120] that when a purportedly pretextual traffic stop has been made on sufficient evidence of the traffic violation, no Fourth Amendment challenge may be undertaken on the grounds that "the actual motivations of individual officers" was to stop in order to investigate some other offense or that "the officer's conduct deviated materially from usual police practices."

Given the prospect that application to traffic arrests of the "general authority" to search will result in instances of undiscoverable subterfuge, one is tempted to say that a different search rule is needed in traffic cases, "one less likely to conceal a search forbidden by the Fourth

116. For example, that the officer was not assigned to traffic or general law enforcement, but to enforcement of the drug laws. See LaFave, Search and Seizure: "The Course of True Law ... Has Not ... Run Smooth," 1966 U.Ill.L.F. 255, 282. Consider also State v. Blair, 691 S.W.2d 259 (Mo. 1985) (detective investigating homicide had defendant arrested on outstanding city warrant for traffic violation, defendant then taken to homicide unit where palm print matching that at homicide scene taken; held, "the arrest * * * was at best a pretext employed to gather evidence on an unrelated homicide"); Black v. State, 739 S.W.2d 240 (Tex.Crim.App.1987) (arrest a pretext; the "officers were homicide detectives, and if they were in the habit of enforcing traffic laws or of writing traffic tickets, there is nothing in the record indicating any were written on this occasion").

117. See, e.g., People v. Watkins, 19 Ill.2d 11, 166 N.E.2d 433 (1960) (officers assigned to *gambling* squad had been following defendant for some time, arrested him for parking too close to a crosswalk, "the kind of minor offense that ordinarily results in a 'parking ticket' hung on the handle of the door of the car"); State v. Sanders, 154 Ga.App. 305, 267 S.E.2d 906 (1980); People v. Holloway, 416 Mich. 288, 330 N.W.2d 405 (1982) (officer in charge of tactical surveillance unit involved in investigation of street crimes arrested defendant on outstanding traffic warrant, searched and found narcotics); Anderson v. State, 444 P.2d 239 (Okl.Crim.App.1968) (city policeman who arrested defendant for making right turn from incorrect lane was accompanied by a federal narcotics agent); Adair v. State, 427 S.W.2d 67 (Tex.Crim.App.1967) (officer followed defendant for 15 blocks because he looked suspicious and then arrested him for changing lanes without signalling).

118. 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978).

119. United States v. Trigg, 878 F.2d 1037 (7th Cir.1989) (rejecting district court conclusion traffic arrest by narcotics officers a pretext; court says motives and usual practice irrelevant and it sufficient that probable cause for arrest existed); United States v. Kordosky, 878 F.2d 991 (7th Cir. 1989), judgment vac'd on other grds., 495 U.S. 916, 110 S.Ct. 1943, 109 L.Ed.2d 306 (1990) (drug officer's arrest for traffic violation valid because probable cause, fact it done to seek drugs in car search incident to arrest irrelevant); State v. Davis, 35 Wash. App. 724, 669 P.2d 900 (1983) (motive irrelevant if grounds for arrest actually existed). The wisdom of the *Scott* rule is considered in § 1.4.

120. 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), discussed in § 1.4(e).

Amendment."[121] But this is not easily done. As concluded earlier, a *Terry*-type frisk does not afford the arresting officer sufficient protection against an arrestee, considering their prolonged proximity. Once something beyond the frisk is permitted, it does not seem feasible to describe in meaningful terms a degree of intrusiveness which can reasonably be expected to turn up "any small hidden weapon which might go undetected in a weapons frisk"[122] but not an item of contraband. And while statistically there may be a lesser likelihood that a traffic violator is armed, it by no means follows that there is any rational basis upon which to determine which traffic violators are armed,[123] or upon which to conclude that a search of some lesser intrusiveness will suffice to discover weapons in such cases. It is troublesome, to say the least, to contemplate affording Officer *A* something less than the protection he needs in making arrests because Officer *B* might abuse the power. At least, such a step should not be undertaken unless there is no other means of meeting the pretext problem.

(f) Broadening the exclusionary rule. One way of dealing with the problem just stated would be to remove the temptation to engage in pretext arrests by broadening the exclusionary rule so as to exclude from evidence anything but a weapon found in a search incident to an arrest for a crime, such as a traffic violation, for which there existed no justification to search for anything but a weapon. (Such a solution might be equally attractive as to other police practices where weapons are the only legitimate quest and the temptation to utilize the practice for other purposes is substantial, such as frisk incident to stopping for questioning[124] and the airport hijacker detection search.[125]) This, of course, would be a significant departure from existing law, for under what might be called the "serendipity doctrine" contraband not sought but discovered during a properly limited search may be seized and is admissible in evidence.[126]

The Supreme Court has declined to so extend the exclusionary rule. In *Michigan v. Long,*[127] unwisely[128] recognizing a broad power of police to conduct a protective search of a vehicle incident to an investigative stopping on reasonable suspicion of the person who had been driving the car, the Court rather summarily concluded that if "the officer should, as here, discover contraband other than weapons, * * * the Fourth Amendment does not require its suppression." But, why not? In *United States v. Calandra,*[129] the Court declined to utilize the exclusionary rule so as to free a grand jury witness from answering questions based on a prior illegal search directed at him, finding "it unrealistic to assume that

121. United States v. Robinson, 471 F.2d 1082 (D.C.Cir.1972) (Bazelon, J., concurring).

122. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (Marshall, J., dissenting).

123. See note 98 supra.

124. See § 9.6(f).

125. See § 10.6(h).

126. Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947).

127. 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

128. See § 9.6(f).

129. 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974).

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131. Id. at 437.

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application of the rule to grand jury proceedings would significantly further [the] goal" of deterring police misconduct. If the fruits of an admittedly illegal search need not be suppressed where, as in *Calandra*, there would be a "minimal advance in the deterrence of police misconduct," then why does it not follow that the exclusionary rule *should* be employed when the deterrence objective could be substantially advanced, without regard to whether it is certain there has been an illegal (i.e., improperly motivated) search in the particular case?

The answer some would give is that by hypothesis this approach would sometimes result in the exclusion of, say, heroin where there has in fact been no police wrongdoing in the particular case. But it must be remembered, as the Court acknowledged in *Calandra,* that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." This would appear to be a long overdue recognition of a "regulatory" rather than an "atomistic" view of the Fourth Amendment.[130] Under the former, "there is no necessary relationship between the violation of an individual's fourth amendment rights and exclusion of evidence"; rather, the "exclusionary rule is simply a tool to be employed in whatever manner is necessary to achieve the amendment's regulatory objective by reducing undesirable incentives to unconstitutional searches and seizures."[131] This being the case, there is much to be said for excluding evidence other than weapons obtained incident to a traffic arrest, given the inherent difficulties in separating those searches which are in fact lawful from those which are not.

(g) Limiting searches by limiting "custodial arrest." For those who find the above solution to the pretext problem strong medicine, there remains yet another alternative. As noted earlier, *if* the officer and arrestee are going to be in close proximity for some time as a consequence of the arrest, as is the case when the arrest is "custodial" under *Robinson,* then in the interest of freeing the officer from "unnecessary risks" a rather thorough search of the person must be permitted. It seems equally clear, however, that a brief confrontation on the street does not present the same potential danger and that such an event at best justifies a search which is considerably less intrusive in nature.[132] This being so, it would seem that the overriding question presented by *Robinson* and *Gustafson* is not what degree of search may be conducted incident to a "custodial arrest," but rather when such an arrest is itself warranted so as to call for a full protective search. That is, if a full search for self-protection is necessary only in the event of a "custodial arrest," then is not such a search unnecessary if the antecedent "custodial arrest" was unnecessary?[133] A few lower courts took the view that

130. Amsterdam, supra note 30, at 437–39.

131. Id. at 437.

132. The permissible extent of search when there is no "custodial arrest" is considered in the immediately following subsection.

133. Cf. Justice Harlan's concurring opinion in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), noting

the Fourth Amendment required such a conclusion,[134] and several commentators contended that the Fourth Amendment at least requires that there be established by legislation or police regulation some rational scheme for determining when a noncustodial alternative (i.e., a citation) should be utilized as the means for invoking the criminal process.[135]

that if a policeman has a right "to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence."

134. State v. Jones, 88 Ohio St.3d 430, 727 N.E.2d 886 (2000) (utilizing proposition in Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999), that Fourth Amendment reasonableness requires a weighing of competing interests, court finds warrantless arrest for minor misdemeanor violates Fourth Amendment, considering (i) that the intrusion is severe, as the arrestee "is forced to forfeit control of his person and his movements" and "once placed under arrest a person is subjected to numerous invasions of his or her privacy"; (ii) the government's interests in "enforcing the law and protecting the public" are relatively insubstantial, as reflected by the fact that the punishment for these offenses is only a small fine; and thus (iii) arrest is not necessary absent some reason to believe defendant will not respond to a summons). Cf. Barnett v. United States, 525 A.2d 197 (D.C.App.1987) (re minor traffic violation which a *civil* offense rather than a misdemeanor, "it was not reasonable, within the strictures of the Fourth Amendment, for Willis to effect a full custody arrest accompanied by a body search"); Thomas v. State, 614 So.2d 468 (Fla.1993) ("when a person is charged with violating a municipal ordinance regulating conduct that is noncriminal in nature, such as in the traffic control area," the person may only "be detained for the limited purpose of issuing a ticket, summons, or notice to appear," as a "full custodial arrest in such situations is unreasonable and a violation of the Fourth Amendment").

135. See Butterfoss, Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine, 79 Ky.L.J. 1 (1990) (concluding at 7 that "an approach that * * * reexamines the underlying authority of police officers to arrest and search based on a minor offense, offers the better solution to the 'pretext problem' "); Folk, The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests, 48 U.Cin.L.Rev. 321 (1979) (asserting there should be such a limitation and suggesting how the statutes or regulations should be formulated); Mendelson, Arrest for Minor Traffic Offenses, 19 Crim.L.Bull. 501 (1983) (arguing at 503 that the applicable statutes "should be amended to delineate those offenses where a full scale arrest is permissible and those where a citation must be issued"); Salken, The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses, 62 Temple L.Rev. 221 (1989) (arguing at 252–73 that the Fourth Amendment limits the power to arrest for traffic violations); Comment, 1991 Wis.L.Rev. 345 (1991) (emphasizing need for legislative action limiting circumstances in which misdemeanor arrests may be made).

Of course, this or other limitations may exist as a matter of state law. United States v. Mota, 982 F.2d 1384 (9th Cir.1993) (where custodial arrest made in violation of state law requiring citation alternative in ordinance violation cases, arrest was unreasonable as a Fourth Amendment matter and thus evidence obtained in a search incident thereto must be suppressed; case further discussed in § 1.5(b)); United States v. Guzman, 864 F.2d 1512 (10th Cir.1988) (stop for seat belt violation, once officer determined driver licensed, "his authority was limited by both state law and the Fourth Amendment to issuing a citation or warning"); Barnett v. United States, 525 A.2d 197 (D.C.App.1987) (evidence obtained in search incident to arrest for violation of traffic regulation that prohibits "walking as to create a hazard" suppressed, as D.C. Code authorizes arrest for such civil offense only when defendant does not provide name and address); State v. Varnado, 582 N.W.2d 886 (Minn.1998) (search before arrest cannot be justified as search incident to later but contemporary arrest, as the arrest was only for crime discovered in search, not earlier-discovered offense of driving without a license, as "the crime for which there is probable cause to arrest must be a crime for which a *custodial* arrest is authorized," not the case here because state law bars arrest for misdemeanors except upon circumstances not present in this case); State v. Carlson, 198 Mont. 113, 644 P.2d 498 (1982) ("full custodial arrest and mandatory search for a minor traffic violation is unreasonable" under "our unique state constitutional provisions which defends the right of individual privacy absent a showing

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It is important to note that *Robinson* and *Gustafson* are quite different in this respect. In *Robinson,* Officer Jenks was acting pursuant to detailed police regulations[136] which required him to arrest for a few traffic offenses, including operating a vehicle after revocation of an operator's permit, and which required him to merely issue a traffic violation notice in most other instances. By contrast, there was no comparable regulation in *Gustafson,*[137] and it appears that the officer was free to arrest or merely ticket for the offense of driving without a license, as he saw fit.[138] But the Court declared it did "not find these differences determinative of the constitutional issue," and thus, as Professor Amsterdam has put it, missed the chance to make "the greatest contribution to the jurisprudence of the fourth amendment since James Otis argued against the writs of assistance in 1791."[139]

This is not to say that the Court in these cases unequivocally rejected the proposition that a seizure of the person may be unreasonable under the Fourth Amendment when the less intrusive alternative of a citation would clearly suffice to serve the government interests involved. While the Court's opinion in *Gustafson* dismisses rather summarily the petitioner's point that the instant case was unlike *Robinson* because "there were no police regulations which required the officer to take petitioner into custody," the fact remains, as Justice Stewart pointed out in his concurring opinion, that the petitioner in *Gustafson* "fully conceded the constitutional validity of his custodial arrest." Left unresolved, therefore, was what Justice Stewart characterized as the "persuasive claim * * * that the custodial arrest of the petitioner for a minor traffic violation violated his rights under the Fourth and Fourteenth Amendments."[140]

of compelling state interest"); State v. Hehman, 90 Wash.2d 45, 578 P.2d 527 (1978) ("custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs the promise to appear"). Compare State v. Ranson, 245 Neb. 71, 511 N.W.2d 97 (1994) (custodial arrest for littering and search incident thereto lawful notwithstanding general statutory preference for use of citations, as defendant here failed to identify self and statute says no citation may be issued without name and address of person to be cited).

On the ways by which several state courts have narrowed the impact of *Robinson,* see Hancock, State Court Activism and Searches Incident to Arrest, 68 Va.L.Rev. 1085, 1109–28 (1982).

136. Metropolitan Police Department General Order No. 3, Series 1959 (April 24, 1959), set out in relevant part in United States v. Robinson, 471 F.2d 1082, 1097 n. 23 (D.C.Cir.1972).

137. As is not infrequently the case in other jurisdictions. See, e.g., United States v. Wilson, 853 F.2d 869 (11th Cir.1988) (driving on suspended license not on statutory list of offenses for which citation required or prohibited); People v. Meredith, 763 P.2d 562 (Colo.1988) (statute says officer "may" arrest for driving without license).

138. The Court noted: "Smith testified that he wrote about eight to 10 traffic citations per week, and that about three or four out of every 10 persons he arrested for the offense of driving without a license were taken into custody to the police station. Smith indicated that an offender is more likely to be taken into custody if he does not reside in the city of Eau Gallie."

139. Amsterdam, supra note 30, at 416.

140. Some courts, taking specific note of Justice Stewart's concurring opinion in *Gustafson,* have concluded that the question of when a custodial arrest is constitutionally permissible is still open. See, e.g., State v. Martin, 253 N.W.2d 404 (Minn. 1977); People v. Clyne, 189 Colo. 412, 541 P.2d 71 (1975) (both finding it unnecessary to resolve the issue because applicable state or local law required use of a citation under the circumstances presented).

A holding by the Supreme Court to that effect would be most desirable, as it would address specifically a current problem of considerable seriousness: the arbitrariness and inequality which attends unprincipled utilization of the "custodial arrest" and citation alternatives.[141] Moreover, it would substantially diminish the opportunities for pretext arrests, and thus would make the *Robinson-Gustafson* "standardized procedures" approach to searches of the person incident to arrest much more palatable. But this did not come to pass; instead, as discussed in much more detail elsewhere herein,[142] the Court held in *Atwater v. City of Lago Vista*[143] that the Fourth Amendment provides no such protection, and thus upheld the custodial arrest of a woman for a seat belt violation punishable only by a fine. *Atwater* was a § 1983 case rather than a suppression case, it appeared the officer opted for custodial arrest over a citation for spite rather than because of a desire to take advantage of the search opportunities afforded by *Robinson* and *Gustafson*, and the arrest did not produce any evidence of any kind, meaning that the issue discussed here was not highlighted by the facts of the case. But the four dissenting Justices appreciated the connection, for they emphasized the search opportunities present if and only if the officer opts for a custodial arrest, and then objected that "the majority gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate." Remarkably, the majority in *Atwater* conceded that "Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case," but then concluded she could not prevail in light of

However, some courts act as if the question had been resolved by *Robinson* and *Gustafson*. See, e.g., United States v. Franklin, 728 F.2d 994 (8th Cir.1984) (citing *Gustafson* for the proposition that the "constitutional reasonableness of an arrest and search incident thereto is not affected by the absence of a police regulation requiring that a police officer take a person into custody for the particular offense"); State v. Lohff, 87 S.D. 693, 214 N.W.2d 80 (1974) (summarily dismissing defendant's claim that he should have been given a citation, as the officer was entitled to do by law, rather than arrested).

141. In People v. Copeland, 77 Misc.2d 649, 354 N.Y.S.2d 399 (1974), suppressing drugs found in a search following arrest for a minor traffic violation on the ground that the offender was constitutionally entitled to be issued a summons rather than arrested, the court noted: "If a police officer issues a summons to appear to one traffic violator, and arrests another for the same infraction, absent distinguishing factors the person arrested has been denied his fundamental right of equal protection under the laws in accordance with the Fourth and Fourteenth Amendments of the United States Constitution.

"Inequality in the treatment of the two motorists is patently manifest. The summoned violator accepts his ticket, drives off in the comfort of his vehicle to the comfort of his home, his freedom intact, to answer the summons with dignity. Conversely, the arrested violator is handcuffed, hustled into a police vehicle, placed in detention with the common felon, and often subjected to an horrendous invasion of his person by a search. This motorist has been denied his liberty without due process of law contrary to the Fourteenth Amendment of the United States Constitution * * *.

"The requirements of law enforcement are satisfied by the issuance of a summons, and a police officer should not be permitted to deviate from that normal ordinary procedure without further cause. A police officer may arrest for a minor traffic infraction only when there is probable cause to believe that the offender is guilty of an offense other than the simple traffic infraction, or there are special circumstances in addition to the commission of the alleged traffic infraction."

142. See § 5.1(i).

143. 532 U.S. 318, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001).

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Robinson's teaching "that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."

(h) Search where no "custodial arrest." In *United States v. Robinson,*[144] the Court dealt only with the question of what type of search of the person could be undertaken incident to a "full custody arrest," that is, where the officer had seized the person with the intention of thereafter having him transported to the police station or other place to be dealt with according to law.[145] The Court made it clear that it did "not reach the [other] question discussed by the Court of Appeals," which was what the officer might lawfully do when he "makes what the court characterized as 'a routine traffic stop,' i.e., where the officer would simply issue a notice of violation and allow the offender to proceed." However, much of the Court's analysis in *Robinson,* such as the emphasis upon the fact "that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop," suggested at that time that the Supreme Court would not disagree with the approach taken by the court of appeals with respect to this other question.

As to the temporary detention on the scene for purposes of giving a traffic citation, which might well be considered an arrest which is other than "custodial"[146] but in any event is a seizure within the meaning of the Fourth Amendment, the court of appeals in *United States v. Robinson*[147] had this to say about a search during[148] such detention:

144. 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

145. See State v. Paul T., 128 N.M. 360, 993 P.2d 74 (1999), deeming it unclear whether *Robinson* applied in that case, which involved police apprehension of a 15–year-old out in violation of the curfew ordinance. The ordinance required that such curfew violators be released to their parent or guardian, which apparently is why the court characterized the case as one where the juvenile "was taken into custody but not formally arrested." Relying on the state constitution, the court held that only a frisk was permissible in such circumstances prior to transportation of the juvenile in the police car.

Actually, the Court's holding in *Robinson* refers to "the case of a lawful custodial arrest," and thus one court has held that if a custodial arrest is in fact made but is unlawful under the law of the jurisdiction where made because of a statutory requirement that a noncustodial alternative be used, then the arrest is unreasonable under the Fourth Amendment, requiring suppression of the evidence found in the incidental search. United States v. Mota, 982 F.2d 1384 (9th Cir.1993), discussed in § 1.5(b).

146. See W. LaFave, Arrest 187–88 (1965), noting that statutes often characterize this as an arrest, perhaps in an effort to provide a basis for search even if a citation is given. Consider in this regard People v. Bland, 884 P.2d 312 (Colo.1994) (statute stating person may be "arrested or detained" for possession of one ounce or less of marijuana but that officer "shall prepare a written notice or summons" interpreted to mean that "it requires the officer to issue a summons and then prohibits custodial arrests but does not prohibit non-custodial arrests and lawful searches made incident to such arrests"). For further consideration of this approach, see text at note 205 infra.

147. 471 F.2d 1082 (D.C.Cir.1972).

148. If the search occurs *after* the detention has ended, the court, without even making the distinction noted above between custodial and noncustodial arrests, might

[T]he dangers presented in that situation are to some extent similar to, and certainly no greater than, those presented in the stop-and-frisk situations involved in *Terry* and *Sibron*. Like the investigatory stop, the routine traffic arrest is merely a brief on-the-street encounter. Moreover, the vast majority of traffic violators are law-abiding citizens. * * *

This is not to say, of course, that a minor traffic stop can never erupt into violence. On the contrary, whenever a police officer confronts a citizen on the street an element of danger is present. But as the stop-and-frisk cases make clear, the mere possibility of danger cannot justify any and all searches the officer may wish to conduct. The touchstone of the Fourth Amendment is reasonableness, and the possibility that a routine traffic stop might result in injury to the officer, although unquestionably real, is so remote that "[t]o allow the police to routinely search for weapons in all such instances would * * * constitute an 'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile."[149] * * *

We therefore conclude that the permissible scope of searches incident to routine traffic arrests, where there is no evidentiary basis for a search and where the officer intends simply to issue a notice of violation and to allow the offender to proceed, must be governed by the teaching of the Supreme Court as set forth in *Terry* and *Sibron*. Thus the most intrusive search the Constitution will allow in such situations is a limited patdown for weapons, and then only when there exist special facts or circumstances which give the officer reasonable grounds to believe that the person with whom he is dealing is armed and presently dangerous.

This came to be the generally accepted view, and thus when the Supreme Court ultimately had occasion to speak to this point over 25 years later, the Court in *Knowles v. Iowa*[150] unhesitantly declared that in the case of a person for whom there is probable cause to arrest but who was detained but not subjected to a custodial arrest, police should have the same power to search for their self-protection as incident to a *Terry* stop on reasonable suspicion of criminal activity. This means, the Court elaborated, that per *Terry* the police may "perform a 'patdown' of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous," and per *Michigan v. Long*,[151] may "conduct a *'Terry* patdown' of the passenger compartment of a vehicle upon reason-

simply conclude that it cannot qualify as a search incident arrest "after the defendant is no longer in custody." State v. Lewis, 611 A.2d 69 (Me.1992) (defendant, arrested for operating under influence, had already been released on own recognizance, and thus search incident arrest theory not applicable re search of carry-on bag defendant took with him when officer offered defendant ride to nearby motel).

149. Citing People v. Superior Court, 3 Cal.3d 807, 91 Cal.Rptr. 729, 478 P.2d 449 (1970).

150. 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998).

151. 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

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able suspicion that an occupant is dangerous and may gain immediate control of a weapon." This being so, much of what is said elsewhere in this Treatise[152] concerning such actions is applicable here. The application of *Terry* concepts in this setting means, for example, that when a person is stopped in broad daylight on a heavily-travelled street to be ticketed for the offense of driving without a license plate on the rear of his car, and this person is completely cooperative and gives the officer no cause for alarm, even a pat-down of the person's clothing would not be permissible.[153]

This is not to say, however that the police officer may do nothing in the interest of his own protection except upon evidence tending to show the driver may be armed. Instructive is *Pennsylvania v. Mimms,*[154] where officers stopped a vehicle with an expired license plate for the purpose of issuing a traffic summons. The driver was asked to get out of

152. See § 9.6.

153. People v. Palmer, 22 Ill.App.3d 866, 318 N.E.2d 206 (1974). On remand, however, the Illinois supreme court, 62 Ill.2d 261, 342 N.E.2d 353 (1976), reached the very dubious conclusion that "the absence of license plates suggests a serious violation of the law which justifies a search." A well-reasoned dissent was of the view that "the appellate court correctly concluded that in the circumstances shown by this record, where at the time of the search a custodial arrest had been neither made nor contemplated, the police officer was in precisely the same position, so far as exposure to danger was concerned, as were the inquiring officers in Terry v. Ohio * * *. The reasonableness of the search in this case must be judged by the standards of *Terry* and *Sibron,* and by those standards, under the circumstances which existed at the time of the search, it was unreasonable."

Compare United States v. Thompson, 597 F.2d 187 (9th Cir.1979) (where driver had no driver's license and had to be seated in patrol car during radio check, pat-down proper, as was looking into pocket where defendant repeatedly reached, but search into envelope found in pocket illegal); State v. Torres, 121 Ariz. 110, 588 P.2d 852 (1978) (where defendant stopped for speeding and when asked for registration reentered car to get same from glove compartment, it proper for officer to open door so as to keep defendant within view); People v. Gunsaullus, 72 Ill.App.3d 440, 28 Ill.Dec. 943, 391 N.E.2d 142 (1979) (where registration check suggested possibility car or plates stolen, stop at night and officer alone with 3 persons in car, frisk proper); State v. Smith, 56 Ohio St.2d 405, 384 N.E.2d 280, 10 O.O.3d 515 (1978) (when defendant stopped for running red light made furtive movement under front seat, officer could check that area for weapon); State v. Darrington, 54 Ohio St.2d 321, 376 N.E.2d 954, 8 O.O.3d 318, (1978) (where defendant stopped for careless driving and bulge in coat pocket, frisk proper); Christian v. State, 592 S.W.2d 625 (Tex.Cr.App.1980) (car stopped for speeding, butt of shotgun seen in car no ground for frisk, as such carrying of gun lawful and defendant might have been hunting).

154. 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977). For other discussion of *Mimms,* see Miles, From *Terry* to *Mimms:* The Unacknowledged Erosion of Fourth Amendment Protections Surrounding Police-Citizen Confrontations, 16 Am.Crim. L.Rev. 127 (1978); Sherman, Enforcement Workshop: Traffic Stops and Police Officers' Authority: A Comment on Pennsylvania v. Mimms, 14 Crim.L.Bull. 343 (1978); Comments, 51 U.Colo.L.Rev. 289 (1980); 15 U.C.Davis L.Rev. 171 (1981). Notes, 6 Am. J.Crim.L. 193 (1978); 12 John Marshall J.Prac. & Proc. 207 (1978); 51 Temple L.Q. 814 (1978); 53 Tulane L.Rev. 283 (1978); 14 Wake Forest L.Rev. 1224 (1978).

See also State v. Faber, 343 N.W.2d 659 (Minn.1984) (proper under *Mimms* to have driver stopped for headlights violation get out of car, revealing he intoxicated); State v. Darrington, 54 Ohio St.2d 321, 376 N.E.2d 954, 8 O.O.3d 318 (1978) (*Mimms* procedure may be used against defendant stopped for careless driving, even though officer had not yet decided whether to charge defendant).

Compare State v. Kim, 68 Haw. 286, 711 P.2d 1291 (1985) (*Mimms* rejected as matter of *state* constitutional law). *Kim* was distinguished in Kernan v. Tanaka, 75 Haw. 1, 856 P.2d 1207(1993), where there was a reasonable belief that a crime, not just a traffic violation, was committed.

his car and produce his driver's license, and when he alighted the officer noticed a large bulge under his jacket. Fearing the bulge was a weapon, the officer frisked and found a revolver. The Pennsylvania Supreme Court reversed the defendant's conviction for carrying a concealed weapon on the ground that the officer's order to defendant to get out of the car was an impermissible seizure, in that the officer could not point to "objective observable facts to support a suspicion that criminal activity was afoot or that the occupants of the vehicle posed a threat to police safety."[155] But the Supreme Court did not agree:

> [W]e look first to that side of the balance which bears the officer's interest in taking the action that he did. The State freely concedes the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior. It was apparently his practice to order all drivers out of their vehicles as a matter of course whenever they had been stopped for a traffic violation. The State argues that this practice was adopted as a precautionary measure to afford a degree of protection to the officer and that it may be justified on that ground. Establishing a face-to-face confrontation diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.
>
> We think it too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." * * * And we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. * * *
>
> Against this important interest we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as de minimus. The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing along side it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "petty indignity." * * * What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.[156]

155. Commonwealth v. Mimms, 471 Pa. 546, 370 A.2d 1157 (1977).

156. Stevens, J., joined by Brennan and Marshall, JJ., dissented from the grant of certiorari and from the decision on the merits without full argument and briefing:

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For many years, courts were not in agreement as to whether the *Mimms* reasoning also applies to a passenger in a stopped vehicle.[157] On the one hand, it has been concluded that "the *Mimms* analysis would seem also to justify a policy of ordering passengers out," in that "the same concern of the officers for their own safety applies, and the intrusion on the rights of the passengers occasioned by being required to get out of the car is no greater than the intrusion on the rights of the driver."[158] On the other, the conclusion "that the *Mimms* rationale does not extend to passengers in the automobile" is based upon the fact that the passenger "has broken no law and * * * may walk away from the scene unless the police officer has some other legitimate reason to detain him," and the conclusion that "the passenger has a higher expectation of privacy than the driver because the passenger plays no part in the routine traffic infraction and has reason to suppose that any exchange with the authorities will be conducted by the driver alone."[159] The matter was finally settled when the Supreme Court, in *Maryland v. Wilson*,[160] adopted the former view.

The question remaining after all the foregoing, of course, was whether *Terry*, *Long*, *Mimms* and *Wilson* constitute the sum total of the officer's authority in the case in which, notwithstanding the presence of probable cause to arrest, no custodial arrest, as that term was used in *Robinson*, occurred on that occasion. And that was precisely the question confronted by the Supreme Court in *Knowles v. Iowa*.[161] In that case, a policeman stopped Knowles for speeding and then, pursuant to a statute authorizing (but not requiring) him to issue a citation in lieu of arrest for most bailable offenses, issued Knowles a citation. The officer then made a full search of Knowles car and found a bag of marijuana. That search was upheld by the state courts on the ground that because an Iowa statute declared that issuance of a citation in lieu of arrest "does not affect the officer's authority to conduct an otherwise lawful search,"

ized inquiry into the reason for each intrusion, or some comparable guarantee against arbitrary harassment. A factual demonstration of probable cause is required to justify an arrest; an articulable reason to suspect criminal activity and possible violence is needed to justify a stop and frisk. But to eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin—may escape it entirely."

157. For further discussion of this issue and additional cases in point, see § 9.6(b).

158. State v. Ferrise, 269 N.W.2d 888 (Minn.1978) (stated in support of conclusion that "the intrusion into the passenger's privacy was minimal" where officer opened door to talk to passenger about whether he could identify driver, who had no license or other identification).

159. State v. Williams, 366 So.2d 1369 (La.1978) (also expressing agreement with dissent in *Mimms*). See also Johnson v. State, 601 S.W.2d 326 (Tenn.Cr.App.1980) (where after traffic stop officer opened passenger's door and saw and smelled marijuana, conduct illegal notwithstanding *Mimms*, as "there simply is no explanation for the officer's conduct in opening the car door to 'check the passenger' except curiosity").

160. 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), discussed in detail in § 9.6(a).

161. 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998), noted in 26 Am. J.Crim.L. 193 (1998); 31 Conn.L.Rev. 1217 (1999).

it sufficed that prior to the search the officer had probable cause to make a custodial arrest.

A unanimous Supreme Court reversed on the ground that neither of "the two historical rationales for the 'search incident to arrest' exception" were present in the instant case. As for the first one, disarming the suspect, the Court quite logically concluded that the "threat to officer safety from issuing a traffic citation * * * is a good deal less than in the case of a custodial arrest" and is "more analogous to a so-called *Terry* stop," meaning that the authority granted the police as to the latter event (again, *Terry* plus *Long* plus *Mimms* plus *Wilson*) would suffice here as well. As for the second rationale, the discovery and preservation of evidence, the Court noted that "no further evidence of excessive speed was going to be found" either on defendant's person or in the vehicle, and that the purported risk that the person might engage in "destruction of evidence relating to identity" was not a legitimate concern because a driver who did not furnish satisfactory identification would for that reason be subjected to custodial arrest instead of merely receiving a citation. Of course, in *Robinson* the Court had held that a search was permissible in *all* custodial arrest situations, without regard to whether either of the aforementioned dangers was present. But, the Court now declared in *Knowles*, that was a "bright-line rule" which it was not prepared to extend beyond the custodial arrest situation to which it had been applied in *Robinson*.[162]

That rather compelling reasoning, plus the fact that the opinion in *Knowles* was both short and unanimous, all seems to suggest that the issue under consideration here stands apart from most Fourth Amendment questions in being very simple and straightforward and admitting of only one reasonable answer. But before that conclusion is accepted too readily, perhaps some further thought should be given to the Iowa statute, which also exists in a somewhat similar form in some other jurisdictions,[163] and which certainly bears a relationship to recommendations appearing in several "law reform" efforts, most directly to the American Bar Association's original Standards for Criminal Justice. Those Standards state that "Nothing in these standards should be construed to affect a law enforcement officer's authority to conduct an otherwise lawful search even though a citation is issued," and by way of justification of such a policy the commentary explains that "these standards should not operate to hamper in any way the police officer's authority to make a lawful search, for otherwise he would properly elect to make the search rather than issue a citation."[164] *If* the ABA was correct in claiming, in effect, that much broader use of the citation

162. Thus it is *Robinson* and not *Knowles* that applies when a custodial arrest *is* made, even though it is thereafter necessary to uphold the arrest on a ground, i.e., for an offense, other than relied upon by the arresting officer. United States v. Bookhardt, 277 F.3d 558 (D.C.Cir.2002).

163. See, e.g., Ark.R.Crim.P. 5.5. For a somewhat different approach, see note 173 infra.

164. ABA Standards Relating to Pretrial Release § 2.4 (1968). For the later change in the approach taken in the Standards with respect to this matter, see text following note 174 infra.

alternative would not occur if police choice of citation over arrest left them with less search authority, then it might be argued that *Knowles* is wrong because by like token it serves to discourage use of the citation alternative and thus well may serve to bring about many unnecessary custodial arrests.

However, the way that issue looked to the ABA in 1968 and the way it looks today, especially if viewed from the perspective of the *Knowles* facts, might well be different. For one thing, the Standard quoted above appears with a strong recommendation favoring extension of the citation alternative beyond its traditional use in traffic enforcement,[165] and in that context the notion that such a "reform" would not occur if as a consequence police authority to search was diminished has some plausibility. But in *Knowles*, where the search was incident to the longstanding practice of issuing a citation for speeding, it is not easy to claim that if the statutory search right is take away, then all speeders will be arrested. More important, however, is the fact that to say *today* that citation issuance should carry with it the same search authority as custodial arrest is to suggest a much broader range of authority than was contemplated back in 1968: it was *after* the promulgation of the Standards that the Supreme Court held in *Robinson* that *all* such arrestees could be searched, even when the facts of the case showed not a scintilla of danger and no possibility of evidence for the crime for which the arrest was made, and then held in *New York v. Belton*[166] that the same was true as to search of the entire passenger compartment the arrestee had occupied. Moreover, to suggest today that searches be allowed incident to issuance of citations is to broaden substantially the opportunities for pretextual law enforcement, using traffic laws to search for guns and drugs, for what has also happened in the interim is that such pretextual activity has become commonplace, frequently reported in both newspapers and appellate cases, while the Supreme Court has curiously concluded that such abuses do not intrude upon values protected by the Fourth Amendment.[167]

Having said that, it is still arguable that at least *sometimes*, beyond those circumstances also permitting search if there were only a *Terry stop*, search and citation could and should legitimately coincide because there exists a need to acquire evidence from the person or his vehicle yet no need otherwise for custodial arrest of the defendant. The example often given is that of a "bagman" for a numbers or policy racket, a lower echelon courier who, as one judge once put it, "would not leave town if an atomic bomb were dropped on it."[168] From the standpoint of assuring appearance at subsequent proceedings there is no reason why the criminal process cannot be invoked against such a person by a citation rather than a custodial arrest. Traditionally, however, such perpetrators have been arrested so that they or the vehicles in which they are found

165. Id. at § 2.3.

166. 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

167. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), discussed in § 1.4(f).

168. W. LaFave, supra note 146, at 187.

can be searched for gambling slips and gambling funds. One way of looking at that illustration is to say that it proves the absence of a need for search authority flowing from citation issuance because the necessary authority is otherwise available. So the argument would proceed, if there is probable cause to arrest the bagman, then there is probable cause to search his person and his vehicle if he is using one.[169]

But, while that will often be true, it will not inevitably be true, because the probability a particular person has committed an offense, even of this kind, does not necessarily mean that there is also the requisite probability that his person or car *presently* contains evidence of that criminality.[170] When the police *do* make a custodial arrest, the police need not worry about that added complication, for the search allowed by *Robinson* and *Belton* does not require the latter variety of probable cause. The very difficult question is whether, when (unlike the *Knowles* facts) there is at least a possibility that evidence of the offense might be found in a search, the price for use of the citation alternative should be loss of the opportunity to learn whether in fact such evidence is present. This hard question remains open after *Knowles*, for the Court only passed on "the search at issue" and did not invalidate the statute the state courts had relied upon; indeed, the Court emphasized that Knowles "did not argue * * * that the statute could never be lawfully applied." Some lower courts have concluded that a search for evidence is permissible in the circumstances described above,[171] while another view is that such a search is permissible only if a prior frisk reveals an object reasonably believed to constitute evidence of the offense.[172]

169. It is clear that a warrantless search of a vehicle may be made on probable cause. See § 7.2(b). As for search of an unarrested person on probable cause the person possesses evidence, the circumstances in which this is permissible are less clear because of the qualifying language the Court has used with regard to what exigent circumstances must exist and how intrusive the search may be. See § 5.4(b).

170. See § 3.1(b).

171. See People v. Bland, 884 P.2d 312 (Colo.1994) (where defendant subjected to noncustodial arrest for possession of not more than one ounce of marijuana and statute barred custodial arrest, search of defendant's person revealing baggy of crack in genital area was lawful, as in such circumstances police entitled to make "an extensive search for evidence of marijuana possession" which "may be equal in scope to a full search incident to a custodial arrest"); State v. Evans, 352 Md. 496, 723 A.2d 423 (1999) (in circumstances described in text following note 175, court finds "*Knowles* inapposite" because "unlike the citation of Knowles for speeding, the arrests of Evans and Sykes-Bey for drug trafficking incorporated both of the historical justifications for conducting a full search incident: the safety of the arresting officers as well as the need to discover and preserve evidence"); State v. Greenslit, 151 Vt. 225, 559 A.2d 672 (1989) (officer smelled burning marijuana and saw smoke coming from a parked car, so he ordered passengers to hand over any drugs or he would search them; defendant handed over drugs, and officer then gave him a notice to appear in court; because drugs were handed over in response to threat to search defendant's person, court focused on issue of whether such a search could have been made in these circumstances and answered in the affirmative: "The argument that defendant was not formally taken into custody and transported to the police station is of no avail, since it is the existence of probable cause for the arrest which brings the search within constitutional limits, not merely the act of taking an individual into custody").

172. Lovelace v. Commonwealth, 258 Va. 588, 522 S.E.2d 856 (1999) (since frisk of defendant stopped for public consumption of alcohol, offense for which summons must be given, revealed only "a 'squooshy' bag," retrieving the bag impermissible because "not in furtherance of either officer safety or the preservation of evidence").

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Some other questions about what *Knowles* did and did not decide and what the impact of that decision could possibly be can be best explored by a series of hypotheticals about what Iowa authorities might conceivably do in an effort to find a way around that decision. One possibility is that the legislature might try for some new terminology. That is, the statute might be amended to make it clear that the event on the street during which a person is detained briefly while a citation is prepared and then handed to him is to be characterized as an arrest, and that a police officer's authority to search incident to that arrest is not affected by the fact that thereafter the arrestee is released and/or given a citation. This approach is already taken in some other states[173] and fully supported by *several* "law reform" proposals,[174] including the second edition of the ABA Standards, which explains the subtle switch from the first edition position this way:

> While the fourth amendment permits searches incident to even those arrests that need not result in a trip to the stationhouse, there must in fact be an arrest in order to justify a search incident to it. Thus, a police officer who decides *ab initio* to issue a citation cannot justify a search of the accused on the ground that the officer could have arrested the accused but did not.

Is this all it takes to make *Knowles* a dead letter? At least one court appears to think so; hard on the heels of *Knowles* came *State v. Evans*,[175] involving a situation in which a drug task force of the Baltimore Police Department, in order "to protect the integrity of the ongoing undercover operation," seized persons on probable cause they were engaged in an illegal drug transaction, ascertained their identity and searched them and seized any drugs found, and then released them; only at the conclusion of the entire operation did the police undertake a "mass sweep," arresting all of the individuals earlier seized. The state claimed those searches were searches incident to arrest, to which the defendants contended that those brief seizures, not involving either a taking to the station *or* the issuing of a citation *or* any formal charge were not arrests. The court rejected that contention on the ground that "probable cause" plus police "custody and control" of the persons was all that was necessary for "a valid arrest under Maryland law," and then opined that "*Knowles* might easily be distinguished from the present cases by its lack of the crucial precipitating event for a search incident to a lawful

173. Ariz.Rev.Stat. § 13-3903 ("Nothing in this section shall be construed to affect a peace officer's authority to conduct an otherwise lawful search incident to his arrest even though such arrested person is released before being taken to the police station or before a magistrate pursuant to this section"); Tenn.Code § 40-7-118 ("Nothing herein shall be construed to affect a peace officer's authority to conduct a lawful search even though the citation is issued after arrest").

174. ABA Standards for Criminal Justice § 10-2.4 (2d ed.rev.1985) ("the defendant's subsequent release on citation should not affect the lawfulness of any search incident to the arrest"); Model Code of Pre-Arraignment Procedure §§ 120.2(2), SS 230.1 (1975) (permitting, respectively, release on citation after arrest and search incident to arrest); Unif.R.Crim.P. 211(b)(3) (1992) (commentary thereto quotes ABA position).

175. 352 Md. 496, 723 A.2d 423 (1999).

arrest, namely an actual arrest as defined by state law."[176] But surely it takes something more than a switch in terminology to undercut *Knowles*; *Evans* is wrong for the same reason that the ABA commentary is wrong: *Robinson* and *Belton* are not search incident to arrest cases, but search incident to "custodial arrest" cases, and if there was ever any doubt about that *Knowles* itself dramatically illustrates how essential the taking-to-the-station aspect of the arrest really is.[177]

Turning now to other possible responses to *Knowles*, it might be thought that if Iowa police wish to continue to have the opportunity to make windfall searches of people like Knowles, then, because they apparently have full discretion to opt for either citation or custodial arrest, they would now resort to the custodial arrest alternative for traffic offenders. But this seems unlikely; the political costs of making custodial arrest the usual choice for traffic offenses would be great, as would the cost in terms of police manpower. Somewhat more likely is that the citation alternative will continue to be used most of the time, now without search as a matter of course, but the custodial arrest alternative will be used occasionally, that is, when (perhaps only because of a "hunch") the police want an excuse to search. Suffice it to note that this would be a virtually risk-free technique, for under *Whren v. United States*[178] the existence of probable cause for arrest makes any arbitrary selection of violators to be arrested immune from Fourth Amendment challenge.

It may even be that this pretext game will be unnecessary. For those who seek to maintain the prior search authority after *Knowles*, the "problem" in that case may be perceived to be the fact that the officer tipped his hand on the citation versus arrest question before the search. Why not just search first? If nothing incriminating is found, then a citation could be issued; if something incriminating is found, the officer then could declare the violator under arrest for the traffic offense and then proceed to take him to the station. As several lower courts have done in circumstances approximating this,[179] the search could then be

176. The court then proceeded to find another basis for upholding the search; see note 171 supra.

177. Cf. Lovelace v. Commonwealth, 258 Va. 588, 522 S.E.2d 856 (1999) (prosecution argues that though offense, drinking intoxicants in public, an offense which statute ordinarily requires result in giving of summons, because statute says offender then to be released "from custody," this means defendant under arrest at time of full search, so that case falls outside *Knowles* rule; court responds that *Knowles* means "an 'arrest' that is effected by issuing a citation or summons rather than taking the suspect into custody does not, by itself, justify a full field-type search").

178. 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

179. See, e.g., United States v. Pratt, 355 F.3d 1119 (8th Cir.2004) (where defendant, a convicted felon, stopped on probable cause of pedestrian traffic violation of walking in street, was frisked and found to possess ammunition, and was then arrested for such possession and ticketed on the traffic offense, court elects to treat this as an arrest/search rather than stop/frisk situation and then reads *Knowles* as not "foreclosing the search-incident-to-arrest exception where the officer has not yet issued a citation and ultimately does subject the individual to a formal arrest on one of multiple grounds lawfully established"); United States v. Lugo, 170 F.3d 996 (10th Cir. 1999) (defendant stopped for speeding and found to be without driver's license, after which search of car uncovered drugs; court says this a valid search incident to arrest,

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upheld on the authority of *Rawlings v. Kentucky*,[180] which concluded that where the arrest was justified before the search and the arrest "followed quickly on the heels of the challenged search," it is "not * * * particularly important that the search preceded the arrest rather than vice versa." The *Rawlings* principle is certainly not objectionable in the abstract, and in most fact situations produces a very sensible result.[181] But if *Rawlings* is not to undo *Knowles*, it will be necessary for the Court to find some way to avoid its use in the manner just suggested. Here again, *Whren* is the villain, for it presents a barrier to two of the most obvious ways in which such selective and after-the-fact custodial arrest decisions might be challenged: because of their deviation from usual practice or because of the subjective state of mind of the officers involved.

The fact that no custodial arrest was made can be important for reasons other than determining whether a lawful search may be conducted. If a custodial arrest *is* made, the continuing detention of the person on the way to the station and, typically, for some period thereafter until the arrestee obtains his pretrial release provides opportunities for a variety of investigative techniques. On the other hand, if a custodial arrest is not made, then it is likely that any such inquiries will be conducted on the scene where the citation is given, which gives rise to the possibility that the defendant will object that certain evidence must be suppressed because obtained after too long a delay notwithstanding the existence of probable cause from the outset. Illustrative is *United States v. Luckett*,[182] holding that where police stopped defendant for a traffic violation and then executed a traffic citation and then detained defendant a bit longer while a "warrant check" was completed, evidence found incident to arrest on a warrant thus uncovered had to be suppressed because defendant's continued detention after the citation was completed was illegal. Suffice it to note here that many courts are not that strict. Because courts typically treat these citation-instead-of-arrest

though it "unclear" whether defendant "formally arrested, and whether the search began before the arrest"); United States v. Anchondo, 156 F.3d 1043 (10th Cir.1998) (drug dog alerted after stop at fixed checkpoint, followed by search of unarrested driver; valid search incident to arrest if grounds for arrest existed before search and arrest made soon after arrest; "Whether or not the officer intended to actually arrest the defendant at the time of the search is immaterial to this two-part inquiry"); State v. Earl, 333 Ark. 489, 970 S.W.2d 789 (1998) (after traffic stop and before arrest, vehicle searched and drugs found; search may come before arrest if then grounds for arrest and two are substantially contemporaneous); State v. Ballard, 987 S.W.2d 889 (Tex.Cr. App.1999) (where lawful stop and determination driver impaired, followed by search of truck that uncovered drugs, "it is irrelevant that the arrest occurs immediately before or after the search, as long as sufficient probable cause exists for the officer to arrest before the search").

Compare State v. Varnado, 582 N.W.2d 886 (Minn.1998) (search before arrest cannot be justified as search incident to later but contemporary arrest, for the arrest was only for crime discovered in search, not earlier-discovered offense of driving without a license, and "the crime for which there is probable cause to arrest must be a crime for which a *custodial* arrest is authorized," not the case here because state law bars arrest for misdemeanors except upon circumstances not present in this case).

180. 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

181. See § 5.4(a).

182. 484 F.2d 89 (9th Cir.1973).

situations just like true *Terry* stops where only reasonable suspicion is present, requiring in both cases that the length and scope of the detention be " 'strictly tied to and justified by' the circumstances which rendered its initiation permissible," this particular problem is considered in more detail later in the stop-and-frisk context.[183]

(i) Use of force. The police sometimes find it necessary to employ force in conducting a search of a person at the arrest scene.[184] The usual case is one in which the arrestee has placed what appear to be drugs into his mouth, and the police then attempt to retrieve the drugs and prevent the arrestee from swallowing them. There is no doubt that the police are entitled to take some action under these circumstances in order to prevent loss of the evidence. "A suspect has no constitutional right to destroy or dispose of evidence by swallowing, consequently he cannot consider the mouth a 'sacred orifice' in which contraband may be irretrievably concealed from the police."[185]

While it is thus clear that the police may use reasonable force in an effort to prevent the loss of the evidence,[186] it is also clear that if the force is excessive then the police have engaged in an unconstitutional act which requires suppression of the evidence obtained in this manner. The use of excessive force, it would seem, makes the search an unreasonable one under the Fourth Amendment, although courts have tended instead to discuss the question in terms of whether the police conduct shocks the conscience and thus violates due process under *Rochin v. California.*[187] In *Rochin,* decided before the Fourth Amendment exclusionary rule was held applicable to the states, police illegally entered the defendant's premises, "jumped upon him" in an unsuccessful attempt to extract the capsules which he put in his mouth, and then took him to a hospital and had his stomach pumped. The Court, per Justice Frankfurter, in concluding that the officers' conduct violated Fourteenth Amendment due process, declared that

> the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound

183. See § 9.3(b)–(f).

184. The use of force to search must be distinguished from use of force to arrest, discussed in § 5.1(d). As for intrusions into the body, sometimes accompanied by force, which may occur during post-arrest detention, see § 5.3(c). Surgery of the defendant to find evidence is considered in § 4.1(e).

185. State v. Williams, 16 Wash.App. 868, 560 P.2d 1160 (1977).

186. United States v. Harrison, 432 F.2d 1328 (D.C.Cir.1970); Espinoza v. United States, 278 F.2d 802 (5th Cir.1960); State v. Lewis, 115 Ariz. 530, 566 P.2d 678 (1977); People v. Bracamonte, 15 Cal.3d 394, 124 Cal.Rptr. 528, 540 P.2d 624 (1975); Foxall v. State, 157 Ind.App. 19, 298 N.E.2d 470 (1973); State v. Santos, 101 N.J.Super. 98, 243 A.2d 274 (1968); Hernandez v. State, 548 S.W.2d 904 (Tex.Crim.App.1977); State v. Williams, 16 Wash.App. 868, 560 P.2d 1160 (1977).

187. 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

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to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

But, while the "course of proceeding" condemned by the Court included "the struggle to open his mouth," the Court did not say that this act standing alone was unconstitutional, and lower courts have not interpreted *Rochin* as barring the use of force to obtain evidence from the mouth of an arrestee.[188]

"The difficulty, of course, lies in differentiating between conduct in which appropriate force counters resistance to a reasonable search and conduct that is condemned by the Due Process Clause."[189] The use of "medical methods,"[190] such as the Heimlich maneuver,[191] have been upheld. But what then of the usual police response in these situations, which is to seize the defendant by the throat, often described in the cases as "choking," in order to prevent him from swallowing the evidence? The prevailing view is that such action is permissible,[192] although there is authority to the contrary. The California cases, in particular, have rather consistently[193] taken the position that choking the suspect is forbidden.[194] Moreover, under those decisions it often does not take much to constitute the prohibited quantum of force, as is illustrated by *People v. Trevino*:[195]

> As to the amount of force that is permissible the cases uniformly reject the use of choking as a means of preventing the destruction of evidence or forcing defendant to disgorge it. * * * Here the officer testified on one occasion that he "grabbed" defendant by the throat and on another occasion described it as applying pressure sufficient to prevent swallowing but not sufficient to cut off air.

188. E.g., State v. Lewis, 115 Ariz. 530, 566 P.2d 678 (1977); State v. Harris, 244 Neb. 289, 505 N.W.2d 724 (1993); State v. Santos, 101 N.J.Super. 98, 243 A.2d 274 (1968).

189. State v. Lewis, 115 Ariz. 530, 566 P.2d 678 (1977).

190. Archer v. Commonwealth, 20 Va. App. 87, 455 S.E.2d 280 (1995).

191. Jones v. United States, 620 A.2d 249 (D.C.App.1993).

192. United States v. Harrison, 432 F.2d 1328 (D.C.Cir.1970); Espinoza v. United States, 278 F.2d 802 (5th Cir.1960); State v. Lewis, 115 Ariz. 530, 566 P.2d 678 (1977); Salas v. State 246 So.2d 621 (Fla. App.1971); State v. Jacques, 225 Kan. 38, 587 P.2d 861 (1978); State v. Winfrey, 359 So.2d 73 (La.1978); State v. Harris, 244 Neb. 289, 505 N.W.2d 724 (1993); State v. Santos, 101 N.J.Super. 98, 243 A.2d 274 (1968); Hernandez v. State, 548 S.W.2d 904 (Tex.Crim.App.1977); State v. Young, 15 Wash.App. 581, 550 P.2d 689 (1976).

193. But see People v. Fulkman, 235 Cal.App.3d 555, 286 Cal.Rptr. 728 (1991) (officer properly pounded defendant on back, placed pressure on Adam's apple to prevent swallowing, and pried contraband out of defendant's mouth with pen); People v. Cappellia, 208 Cal.App.3d 1331, 256 Cal. Rptr. 695 (1989) (accepting criticism of *Trevino* stated herein and following prevailing view).

194. E.g., People v. Jones, 209 Cal. App.3d 725, 257 Cal.Rptr. 500 (1989); People v. Parham, 60 Cal.2d 378, 33 Cal.Rptr. 497, 384 P.2d 1001 (1963); People v. Sanders, 268 Cal.App.2d 802, 74 Cal.Rptr. 350 (1969); People v. Erickson, 210 Cal.App.2d 177, 26 Cal.Rptr. 546 (1962); People v. Taylor, 191 Cal.App.2d 817, 13 Cal.Rptr. 73 (1961); People v. Brinson, 191 Cal.App.2d 253, 12 Cal.Rptr. 625 (1961); People v. Martinez, 130 Cal.App.2d 54, 278 P.2d 26 (1954).

195. 72 Cal.App.3d 686, 140 Cal.Rptr. 243 (1977).

> The application of force to a person's throat is too dangerous and sensitive an activity to be judged on the basis of the officer's assessment as to what amount of force is or is not excessive. That type of force, more than any other, is likely to result in violent resistance by the arrestee, and should be disapproved as a police technique. An application of force to the throat sufficient to prevent swallowing is, in our opinion, the equivalent of choking.

The *Trevino* position, it is submitted, is unrealistic and unduly restrictive. The act to be prevented is the swallowing of the evidence, and thus it makes little sense to say that the minimal pressure necessary to prevent swallowing is excessive, particularly when it is considered that if the drugs are swallowed the defendant may be harmed by them and may have to submit to an even more disagreeable procedure for his own protection or for retrieval of the evidence.[196] Relatively more appealing is the middle ground of *State v. Williams*,[197] which takes a different view of what constitutes "choking":

> We subscribe to the view that it is constitutionally reasonable for the police to "place" their hands on a suspect's throat to prevent the swallowing of evidence, as long as they do not "choke" him, i.e., prevent him from breathing or obstruct the blood supply to his head. * * *
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> We emphasize that the police should be able to take reasonable measures to prevent the destruction of evidence which they are entitled to possess. Specifically, we believe the constitution permits them to place their hands on a suspect's neck to prevent the swallowing of evidence, or to go further when necessary to overcome active resistance. But Williams did not resist beyond refusing briefly to spit out the drugs. We hold that the police, by choking Williams so he could hardly breathe, exceeded the bounds of reasonableness in these circumstances.

The *Williams* position is certainly sound in a theoretical sense, for it distinguishes between that force which merely prevents swallowing, the legitimate objective of the force, and that which goes farther by preventing breathing or obstructing the blood supply. It might be objected, however, that it draws the line in a way which presents some serious practical problems. One is that under the *Williams* definition of "choking" it will be extremely difficult for the court, on a motion to suppress, to make the necessary after-the-fact determination of precisely how the

196. See § 5.3(c). But see Locke v. State, 588 So.2d 1082 (Fla.App.1991) (not proper for officer to choke defendant to prevent swallowing of small amount of drugs); State v. Tapp, 353 So.2d 265 (La. 1977) (choking defendant to retrieve packet of drugs violated due process and Fourth Amendment; "We see no evidence in the record * * * that this material, if swallowed, would not have traveled through defendant's body without destruction of the evidence or harm to defendant").

197. 16 Wash.App. 868, 560 P.2d 1160 (1977). *Williams* was followed in State v. Taplin, 36 Wash.App. 664, 676 P.2d 504 (1984) (test of "whether a choke hold constitutes excessive force is whether the officer's actions completely obstructed the defendant's breathing").

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officer placed his hands on the arrestee's throat.[198] Another is that it may be very difficult for the well-intentioned officer, under the exigencies of the moment, to ensure that the force he applies to the arrestee's throat is only of the permitted variety. This latter problem may be overcome to some degree by the fact that *Williams* recognizes, as have other courts,[199] that in determining whether the force used by the police was excessive it is proper to take into account the forcible resistance offered by the defendant. Stated another way, the defendant should not be allowed to object to the fact that more force was used than *Williams* ordinarily permits when it was his active resistance which made it impossible for the officer to gauge the amount of force he was applying to the defendant.

The aforementioned practical difficulty in drawing the line between permissible and impermissible force could logically result in adoption of a broader prohibition on the use of force, especially when it is determined that alternative means are available to retrieve the evidence. That position is reflected in *State v. Hodson*,[200] where police applied pressure to defendant's throat and thereby forced him to spit out eight small plastic-wrapped heroin chips. Although the court of appeals had adopted a *Williams*-style test, this court disagreed, concluding "that whether or not this defendant's airflow or blood supply was actually impaired, the level of violence and force used by the officer was unreasonable because of the enormous *risk* of such results."

The court was influenced by two considerations: (i) that the distinctions required by *Williams* could be drawn in "the refined atmosphere of an appellate court" but not on the street; and (ii) that there was no reasonable fear "that swallowing the plastic-wrapped chips would render their contents undiscoverable or harmful to defendant," as

> drugs ingested in this manner can only follow two paths: Either they will pass through the system intact because of their packaging, or they will be absorbed into the bloodstream of the swallower. In either event, they are susceptible to identification and recovery in supervised, nonviolent post-arrest settings.

On occasion, courts have had to assess somewhat different types of force than that involved in *Trevino* and *Williams*. It has been held, for example, that the use of force to open the arrestee's mouth is permissible,[201] and even resort to an instrument to force the jaws apart has been

198. As noted in State v. Jacques, 2 Kan.App.2d 277, 579 P.2d 146 (1978), aff'd, 225 Kan. 38, 587 P.2d 861 (1978): "We are unable to reach a rational decision based on whether or not the policeman testified he 'choked' the defendant or merely 'applied pressure.' A criminal trial should be a search for the truth and not dependent upon semantics chosen by an officer."

199. People v. Tahtinen, 210 Cal.App.2d 755, 26 Cal.Rptr. 864 (1962); Foxall v. State, 157 Ind.App. 19, 298 N.E.2d 470 (1973).

200. 907 P.2d 1155 (Utah 1995).

201. State ex rel. Flournoy v. Wren, 108 Ariz. 356, 498 P.2d 444 (1972); People v. Holloway, 416 Mich. 288, 330 N.W.2d 405 (1982) (lawful to apply pressure to sides of jaw to get defendant's mouth open).

As for use of Mace, the court in State v. Jacques, 2 Kan.App.2d 277, 579 P.2d 146 (1978), aff'd, 225 Kan. 38, 587 P.2d 861

upheld when the violent resistance of the defendant thwarted other efforts to obtain the evidence.[202] Use of an instrument to scrape evidence off the arrestee's teeth[203] or tongue[204] has also been held to be reasonable.

As for threatening force which could not lawfully be used, the *Hodson* case is likewise instructive on that point, for the officer in that case also held a gun to the side of the defendant's face and ordered him to spit out the objects he had been seen placing in his mouth as police approached to arrest him for a just-completed drug sale. The court concluded:

> The State argues that the use of the gun to threaten defendant was "brief" and that there was no "express" threat to harm him. We conclude, however, that the only possible inference to be made when someone holds a gun to the head of another and issues an order is that failure to comply will result in use of the gun. Implicit threats are as real as express verbal threats, especially in a highly charged encounter involving physical violence. Certainly, an interrogation conducted while an officer held a gun to a suspect's head and demanded, "Talk!" would be considered unreasonable and a violation of the Fifth Amendment. We do not tolerate threats to shoot suspects as a legitimate means to extract either information or physical evidence; in the absence of any resistance, violence, or opposition to them, police officers cannot reasonably threaten to hurt people they are searching.

Finally, it is important to note that even if a valid arrest has been made and even if the quantum of force used to obtain the evidence does not exceed that which the courts have allowed, it does not inevitably follow that the search by force is lawful. Though *United States v. Robinson*[205] teaches that the "authority to search the person incident to a lawful custodial arrest * * * does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect," that proposition surely does not extend to the kind of situation

(1978), stated: "Trying to force open the mouth of a young, healthy, adult male involves substantial risk both to the police and to the defendant. It would seem to us to be more humane to use a minimal amount of Mace rather than brute force.

"The use of any Mace approaches the outer limits of acceptable conduct on the part of the police officers, and we would have no hesitation in holding that the excessive use of Mace would shock our sense of justice. Here, there is no evidence that the defendant suffered any ill effects as the result of the use of Mace, and we cannot say the use of Mace standing alone is so unreasonable as to offend 'a sense of justice.' "

202. Foxall v. State, 157 Ind.App. 19, 298 N.E.2d 470 (1973). See also People v. Fulkman, 235 Cal.App.3d 555, 286 Cal. Rptr. 728 (1991) (officer properly pried contraband out of defendant's mouth with pen); Archer v. Commonwealth, 20 Va.App. 87, 455 S.E.2d 280 (1995) (use of "jaw screw" to force open mouth proper, as this constitutes "use of a proper medical device in its intended manner").

203. State ex rel. Flournoy v. Wren, 108 Ariz. 356, 498 P.2d 444 (1972).

204. State v. Wood, 262 La. 259, 263 So.2d 28 (1972).

205. 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

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presently under discussion.[206] For the reasons discussed earlier,[207] the Court in *Robinson* wisely permitted the police to utilize "standardized procedures" with respect to the ordinary search of the person incident to arrest. But no one would seriously suggest that a part of these standardized procedures should be the forcible searching of every arrestee's mouth. Rather, forcible "[a]ttempts to prevent destruction of evidence must be based on probable cause to believe that specific evidence is being disposed of."[208] This means, for example, that if a person were arrested for speeding and, while still in the car, took "something" from a passenger and put it in his mouth, this would not justify a forcible search of that orifice because probable cause that the "something" is drugs is lacking.[209]

(j) What may be seized. It is extremely important to distinguish a *search* of the person from a *seizure* of objects found in that search, for unquestionably everything which is uncovered in a lawful search is not thereby subject to lawful seizure, as the Supreme Court has taken pains to emphasize.[210] The leading case on this point is *State v. Elkins*,[211] where the defendant was arrested for public intoxication and then searched, resulting in the officer's discovery of "an unlabeled bottle containing three kinds of capsules and pills." The officer seized them and a later analysis established that some of them were methadone, but at the hearing on the motion to suppress the officer conceded that he had seized them merely because he was suspicious of them and not because he recognized them as contraband. The court held that "before the officer had the right to seize the implements of a crime committed in his presence, other than that for which the arrest was made, he must have reasonable grounds to believe that the article he has discovered is contraband":

> If the rule were otherwise, an officer who desired to inculpate an arrested person in another crime, could seize everything in such person's immediate possession and control upon the prospect that on further investigation some of it might prove to have been stolen or to be contraband. It would open the door to complete temporary confiscation of all an arrested person's property which was in his

206. In *Robinson*, the Court noted that the search at issue "partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause of the Fourteenth Amendment in Rochin," but that is different from the point being made here, which is that force which is not per se excessive is still unreasonable in the absence of probable cause.

207. See § 5.2(b).

208. People v. Trevino, 72 Cal.App.3d 686, 140 Cal.Rptr. 243 (1977). See also Foxall v. State, 157 Ind.App. 19, 298 N.E.2d 470 (1973); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995) (need probable cause drugs in mouth and "clear indication" evidence would otherwise be destroyed).

209. People v. Trevino, 72 Cal.App.3d 686, 140 Cal.Rptr. 243 (1977).

210. Soldal v. Cook County, 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) (in rejecting court of appeals' argument Fourth Amendment not applicable to seizure unaccompanied by a search, Court notes that even as to seizure of objects lawfully discovered and accessed, "in the absence of consent or a warrant permitting the seizure of the items in question, such seizures can be justified only if they meet the probable cause standard").

211. 245 Or. 279, 422 P.2d 250 (1966).

immediate possession and control at the time of his arrest for the purpose of a minute examination of it in an effort to connect him with another crime. Such a practice would be as much an exploratory seizure as one made upon an arrest for which no probable cause existed. Intolerable invasions of a person's property rights would be invited by an *ex post facto* authorization of a seizure made on groundless suspicion. * * *

It is urged that where a properly arrested and searched person's privacy has already been legally violated, no additional harm has been done to him by the seizure. This presupposes that the rights protected are only those of privacy. The right of privacy is undoubtedly one right which is protected. It is a right which has recently been the subject of great emphasis. Historically, there is no doubt but that the founding fathers were also concerned with the violations of property rights which were brought about by indiscriminate seizures through the medium of general warrants and writs of assistance.

Although the Supreme Court has not had occasion to deal with a situation precisely like that presented in *Elkins,*[212] the Court has made it clear that seizures must be made upon probable cause. In *Warden v. Hayden,*[213] in the course of abandoning the so-called "mere evidence" rule, the Court emphasized that there must always "be a nexus * * * between the item to be seized and criminal behavior," that is, "probable cause * * * to believe that the evidence sought will aid in a particular apprehension or conviction." This rule has been applied so as to suppress objects seized upon mere suspicion while executing a search warrant[214] or otherwise lawfully found in plain view in premises[215] or a vehicle.[216] But if there *is* probable cause, "there is no additional requirement of exigency for the seizure of property that is in plain view, provided that the police officer's presence on the property is lawful and the incriminating character of the evidence is immediately apparent."[217]

Though there has been some reluctance to apply the *Hayden* rule in cases where the suspicious object was found on the person of an arrested

212. In *Elkins,* the state argued that the search was justified by Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), for there as well the property seized was related to a matter other than that for which defendant was arrested, as the defendant had been arrested upon a deportation warrant and the agents seized a piece of paper which the defendant attempted to conceal up his sleeve. But the court responded that *Abel* was "a far cry from the present case" because the officers there also had information that the defendant was engaged in espionage.

213. 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967).

214. See § 4.11.

215. See § 6.7.

216. See § 7.5.

217. G & G Jewelry, Inc. v. City of Oakland, 989 F.2d 1093 (9th Cir.1993), interpreting and applying Texas v. Brown, 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). As applied to search of the person incident to arrest, see State v. Payne, 273 Kan. 466, 44 P.3d 419 (2002) (where in search of person incident to arrest officer found crack pipe, the resulting plain view of its "incriminating character" justified seizure).

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individual,[218] there is no reason why the rule should be deemed inapplicable in such a setting. While under *United States v. Robinson*[219] the search of an arrestee for evidence "does not depend on what a court may later decide was the probability in a particular arrest situation that * * * evidence would in fact be found upon the person of the suspect," this certainly does not support the conclusion that *Hayden* is inapplicable to what is found.[220] Indeed, if anything, *Robinson* points in the opposite direction; it is the probable cause requirement for subsequent seizure which makes the *Robinson* rule of search without probable cause (except for the arrest) tolerable.

However, the search-of-the-person case is distinguishable in at least one respect. Unlike the situation where a merely suspicious bottle of pills is observed in premises, the bottle of pills on the person of one arrested will in a sense be seized in any event if a "custodial" arrest is made, so that often the question is really whether the suspicious object may thereafter be subject to close scrutiny and inspection while the arrestee remains in custody. This difficult issue is discussed at a later point.[221] Suffice it to note here that even if it is true that some additional scrutiny would be possible *if* the defendant remains in the hands of the police, it does not necessarily follow that a seizure of an object at the arrest scene without probable cause is permissible. As noted in *Elkins:*

> It is suggested * * * that all property is legally taken from an arrested person upon his incarceration in jail, therefore no harm can be done by taking it from him a few minutes earlier at the time of arrest. This presupposes that the arrested person will be incarcerated after being booked and that he will not be released on bail. This is an unwarranted assumption, particularly in the case of an arrest for a misdemeanor.

218. E.g., Wright v. Edwards, 343 F.Supp. 792 (N.D.Miss.1972).

219. 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

220. In State v. Florance, 270 Or. 169, 527 P.2d 1202 (1974), the court elected to follow *Robinson* rather than the narrower rule theretofore followed in the state, but yet considered the *Elkins* rule to be unaffected by this change. Applying *Elkins*, the court concluded that the officer had grounds for the seizure of plastic bags containing a white powder; "it was not unreasonable for an arresting officer experienced in such matters who found plastic bags containing powdered substances to seize them and have the contents analyzed, considering the fact of common knowledge that illegal drugs are often carried today in the form of powder in plastic bags and that legal drugs are almost never carried that way." But in State v. Lowry, 295 Or. 337, 667 P.2d 996 (1983), holding *Elkins* was not overruled by *Florance*, it was intimated by the majority that *Elkins* is now viewed as grounded in state law and not entirely reconcilable with *Robinson*.

See also State v. Wilson, 467 So.2d 503 (La.1985) (seizure of defendant's blood-stained clothing he was wearing at arrest proper, as officer's conclusion it "would eventually aid in the conviction of Stephen Stinson's murderer is reasonable"); State v. Nuccio, 454 So.2d 93 (La.1984) (even if probable cause lacking as to the person, lawfully arrested on unrelated offense, police could seize large quantity of coins and red bandana because it known former stolen by person wearing latter, and thus "there was probable cause for the police to believe that the items eventually would lead to an arrest or conviction"); Commonwealth v. Robles, 423 Mass. 62, 666 N.E.2d 497 (1996) (seizure of blood-stained coat defendant wearing at time of arrest lawful, as police "had probable cause to believe that the coat was connected to the crime").

221. See § 5.3(b).

However, a temporary seizure of an item at the arrest scene or at the station (even if the defendant's release on bond is forthcoming) can sometimes be justified under the theory of *United States v. Place*[222] upon reasonable suspicion that item is connected with criminal activity.[223]

Library References

C.J.S. Arrest §§ 3–4, 38, 40–49, 54, 65; C.J.S. Criminal Law §§ 770, 778, 790; C.J.S. Motor Vehicles §§ 1321–1335.

West's Key No. Digests, Arrest ⇐63.5(8), 63.5(9), 68(1), 71.1(1)–71.1(7), 71.1(9); Automobiles ⇐349(14), 349.5(9), 349.5(10); Criminal Law ⇐394.4(9).

§ 5.3 Search of the Person During Post-Arrest Detention

Analysis

Subsec.

(a) Search upon arrival at place of detention.
(b) The delayed search and the second look.
(c) Inspections of and intrusions into the body.
(d) Validity of continued custody.

The discussion herein is concerned with those searches of the person which occur at the place of incarceration during the period of post-arrest detention. Such searches are ordinarily conducted as a matter of routine upon the arrestee's arrival at that place, and sometimes they occur again at some later point in the detention process. A search is considered to be "of the person" for the purposes of this section if it involves an examination of or intrusion into the body, or if it necessitates scrutiny of or looking into clothing worn at the time of arrest[1] or effects found in that clothing, whether or not the clothing or effects were actually on the person at the time of the search.[2]

(a) Search upon arrival at place of detention. It now appears to be clearly established that when an arrested person has been delivered to the place of his forthcoming detention, he may be subjected to a rather complete[3] search of his person. This search may be conducted

222. 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), discussed in § 9.8(e).

223. Conrod v. Davis, 120 F.3d 92 (8th Cir.1997) (where defendant arrested for speeding and defendant and his car taken to station "pursuant to state law and local policy regarding the posting of bond" and in search incident to arrest $6,000 in small bills found on his person and $4,000 more in briefcase in automobile, officer could hold the money briefly for nonsearch examination of it, here exposure to drug-sniffing dog, as officer "had a reasonable suspicion that the funds were the product of illegal drug activity").

§ 5.3

1. Or clothing which the police after arrest properly required the defendant to wear. See, e.g., Boardley v. State, 612 A.2d 150 (Del.1992) (where defendant arrested at girl friend's house on "a wintery day," it proper for officer to place defendant's hat on his head, and thus the hat properly inventoried and held at station while defendant in custody).

2. Search of containers, such as suitcases, carried at the time of arrest is separately considered in § 5.5.

3. See § 5.3(c) concerning the limits with respect to inspection of or intrusions into the body.

Knights, 534 U.S. 112, 122 S.Ct. 587, 151 10, text at note 86, concerning a probation , the Court declared that the motivation of nt. And thereafter, in Brigham City, Utah 1943, 164 L. Ed. 2d 650 (U.S. 2006), the existed as to "programmatic searches picion."

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ation when, on the other hand, the aw *forbids* the officer from exercis- he citation alternative? That was *Washington Metropolitan Area* 2-year-old was arrested for eating sit authority station, due to the authority's "zero tolerance" policy olumbia law that prevented offic- inors. On behalf of the minor, it nly be understood in terms of the ering with the discretion of police the spur (and in the heat) of the st or to issue a citation." That is, reasonableness review of an ar- is probable cause, would hobble urt declined to engage in any in- The court found this argument unpersuaded" because it found, *ited States*,[458] that "the most nat- ve cannot inquire further into the arrest when it is supported by ether the decision to arrest upon officer on the beat or at a more , the court noted, the argument assertion that officer discretion is eizure under the Fourth Amend- offenses," a claim which lacks in any event, "would be an unfa- urth Amendment," intended "to tion.[459]

m may be raised as a Fourth hat different context: it may be stitutional rights were violated ocessing was completed, the de- rge was not given a post-arrest In this setting, the failure to af- even if statutorily available, has urth Amendment so long as the e time for judicial review of war- l.[461]

[457]Hedgepeth v. Washington Metropolitan Area Transit Authority, 386 F.3d 1148 (D.C.Cir.2004).

[458]Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

[459]However, in a recent Supreme Court decision *not* involving the Fourth Amendment, the Court felt somewhat differently about police discretion in an arrest context. In Town of Castle Rock v. Gonzales, 545 U.S. 748, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005), in the course of holding that a § 1983 plaintiff did not have a property interest in police enforcement of a restraining order against her husband, the Court explained away state statutory provisions stating that police "shall use every reasonable means to enforce a restraining order" and "shall arrest * * * or * * * seek a warrant," on the ground that such provisions did not "truly ma[k]e enforcement of restraining order *mandatory*," given that a "well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes," so that police with probable cause would "have some discretion to determine that * * * the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance."

[460]See § 5.1(g).

[461]Bryant v. City of New York, 404 F.3d 128 (2d Cir.2005).

§ 5.2 Search of the person at scene of prior arrest

n. 8.

[Replace prior content of this footnote]

While this phrase has sometimes been taken to mean "lawful" in the sense that the law of the jurisdiction where the arrest occurs does not require a noncustodial alternative, e.g., United States v. Mota, 982 F.2d 1384 (9th Cir. 1993), the Supreme Court rejected that position in Virginia v. Moore, __ U.S. __, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008). See § 1.5, text at note 81.1.

n. 13.

State v. Neil, 184 Vt. 243, 958 A.2d 1173 (2008).

n. 36.

7.1(c) should be 7.1(b)-(d).

n. 63.

Re items on the person, United States v. Curtis, 635 F.3d 704 (5th Cir.2011) (following *Finley*, infra); United States v. Murphy, 552 F.3d 405 (4th Cir.2009) ("officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest," without regard to the size of the cell phone's storage capacity); United States v. Finley, 477 F.3d 250 (5th Cir.2007) (since right to search incident to arrest "extends to containers found on arrestee's person," police lawfully retrieved call records and text messages from cell phone found on arrestee's person). Compare State v. Lanegan, 321 Mont. 349, 91 P.3d 578 (2004) (as a matter of *state* constitutional law, upon defendant's arrest for obstructing a police officer, warrantless search of defendant's fanny pack unlawful, as no fruits or evidence of the obstruction would be there, and since defendant already handcuffed no need to search for self-protection or to prevent escape).

n. 64.

United States v. Chauncey, 420 F.3d 864 (8th Cir.2005) (where during course of lawful traffic stop officer arrested defendant for possession of marijuana, defendant's post-arrest statement and urinalysis admissible even if those grounds for arrest inadequate; arrest can be upheld on basis of traffic offense of driving without a license notwithstanding officer's testimony he had earlier decided not to arrest for that).

(Add new text between "intrusion" and "lacks," in text following footnote number 66)

(i) was undertaken in the presence of others,[66.1] or (ii)

[66.1]Campbell v. Miller, 499 F.3d 711 (7th Cir.2007) (strip and body cavity search of arrestee suspected of narcotics offense, involving nudity and visual inspection of anal area, conducted in back yard of friend's house exposed to neighbors, witnessed by defendant's friend and perhaps others, unlawful); Paulino v. State, 399 Md. 341, 924 A.2d 308 (2007), discussed in Recent Development, 38 U.Balt.L.F. 87 (2007) (where police lifted up defendant's shorts and then manipulated his buttocks to find the drugs he was believed to be hiding there, court in concluding search was unreasonable emphasized the record "does not indicate that the officers made any attempt to protect Paulino's privacy interests," as the "search was conducted in the very place in which he was arrested, a car wash" and "there is no indication in the record before us that the police made any attempt to limit the public's access to the car wash or took any similar precaution that would limit the ability of the public or any casual observer from viewing the search of Paulino," and also noted that "the police could have conducted the search in the privacy of a police van").

Compare Jenkins v. State, 978 So.2d 116 (Fla.2008) (no such violation here, as officer "merely pulled back Jenkins' boxer shorts which were already exposed to public view, looked *down* into Jenkins' buttock area, viewed approximately two inches of the plastic bag protruding from between Jenkins' buttocks, and retrieved the bag," and thus "there is no indication that any private body parts or the buttock area became publicly exposed").

n. 67.

Consider with *More* Commonwealth v. Marshall, 319 S.W.3d 352 (Ky.2010) (where defendant was actively selling drugs and tended to carry a weapon and police officer saw defendant place both hands down front of trousers, and frisk revealed rock-like substance, pulling down defendant's pants and underpants, revealing plastic bag of drugs, lawful; court stresses this out of sight of others); Williams v. Commonwealth, 147 S.W.3d 1 (Ky.2004) (on probable cause that defendant "was a known drug trafficker, and he would be carrying a large quantity of crack cocaine in his buttocks," police arrested defendant and took him into nearby accomplice's apartment, took him into bathroom and conducted strip search, revealing plastic bag of cocaine; search lawful, as "officers had good reason to fear that, unless restrained, Appellant would destroy the drugs before they could obtain a warrant").

Compare United States v. McGhee, 627 F.3d 454 (1st Cir.2010) (at-scene strip search "requires only a reasonable basis for supposing that the particular kind of search employed might be fruitful," the case here, as "the officers had ample reason to suspect that McGhee might well be concealing drugs about his person and not just in his pockets"); United States v. Williams, 477 F.3d 974 (8th Cir.2007) (relatively intrusive search of person, reaching inside clothing, reasonable here because police "took adequate precautions to protect Williams's privacy"; court collects and discussed similar cases).

(Add new text at end of paragraph after "for," as a new paragraph, in text following footnote number 67)

If that is so, then it might be asked whether the nature of certain containers carried on the person is such that a full search of them should likewise be deemed so uniquely intrusive as to fall outside *Robinson*. That argument has been made with respect to such "containers" as pagers and cell phones, but as yet with limited success. Courts have had the easiest time regarding the search of pagers incident to arrest, concluding that just as

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Robinson permits a full search of a wallet[67.1] or address book[67.2] on the arrestee's person, so too it is not objectionable that the content's of the arrestee's pager were scrutinized.[67.3] But on the limited occasions when the issue has been reached, courts have also rather consistently found "warrantless searches of cell phones to fall squarely within the search-incident-to-arrest exception,"[67.4] so that call records and text messages found in such a search are thereby admissible in evidence. These decisions, however, may not be the last word on this issue, for each of them involved only "a conventional cell phone," meaning that such a phone's "memory of incoming and outgoing calls, as well as its text messages, can easily be analogized to an address book or a letter in an envelope."[67.5] But search of more sophisticated devices, such as the iPhone, "a handheld wireless device that functions as a cell phone, BlackBerry, camera, music player, and video player, while simultaneously providing internet access,"[67.6] "capable of holding tens of thousands of pages pf personal information,"[67.7] arguably is another matter. Extending *Robinson* to such devices would thus mean that incident to any arrest an officer, without a warrant and indeed without any reason to believe that evidence of crime would be found, would "be in a position to review incoming and outgoing call histories, scan contact lists, read thousands of emails, view nearly limitless numbers of color photographs and movies, listen to voicemail at the touch of a button, and view the internet websites that an arrestee has visited."[67.8]

Noteworthy in that regard is *State v. Smith*,[67.9] where police, after arrest of the defendant for drug dealing activities, seized his cell phone and in a subsequent warrantless search of it incident to arrest found call records, a phone number belonging to a person police earlier had call defendant to arrange a drug purchase, and certain photographs. The court held that activity violated defendant's Fourth Amendment rights:

> Although cell phones cannot be equated with laptop computers, their ability to store large amounts of private data give their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain.[67.10] Once the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither lost nor erased. But because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents.

(Of course, there could under certain circumstances be exigent circumstances justifying dealing with the cell phone in a certain way without first obtaining a search warrant.)[67.11]

[67.1] E.g., United States v. Molinaro, 877 F.2d 1341 (7th Cir.1989).

[67.2] E.g., United States v. Rodriguez, 995 F.2d 776 (7th Cir.1993).

[67.3]United States v. Ortiz, 84 F.3d 977 (7th Cir.1996); United States v. Reyes, 922 F.Supp. 818 (S.D.N.Y.1996); United States v. Lynch, 908 F.Supp. 284 (D.V.I.1995); United States v. Chan, 830 F.Supp. 531 (N.D.Cal.1993).

[67.4]Note, 42 Ga.L.Rev. 1165, 1189–90 (2008). See United States v. Curtis, 635 F.3d 704 (5th Cir.2011); United States v. Murphy, 552 F.3d 405 (4th Cir. 2009); United States v. Finley, 477 F.3d 250 (5th Cir.2007); United States v. Valdez, 2008 WL 360548 (E.D.Wis.2008); United States v. Mercado-Nava, 486 F.Supp.2d 1271 (D.Kan.2007); United States v. Dennis, 2007 WL 3400500 (E.D. Ky.2007); People v. Diaz, 51 Cal.4th 84, 119 Cal.Rptr.3d 105, 244 P.3d 501 (2011) (Supreme Court "decisions do not support the view that whether police must get a warrant before searching an item they have properly seized *from an arrestee's person* incident to a lawful custodial arrest depends on the item's character, including its capacity for storing personal information").

[67.5]Gershowitz, The iPhone Meets the Fourth Amendment, 56 UCLA L.Rev. 27, 39–40 (2008).

[67.6]Gershowitz, 56 UCLA L.Rev. 27, 29 (2008).

[67.7]Gershowitz, 56 UCLA L.Rev. 27 (2008).

[67.8]Gershowitz, 56 UCLA L.Rev. 27, 44 (2008). But see the *Murphy* case, note 63 supra.

While Gershowitz believes that the courts "most certainly will" apply "the search incident to arrest doctrine to the iPhone," id. at 44, he goes on to discuss several approaches "courts and legislatures might adopt to address this problem, id. at 45, all deemed to have flaws but to be "likely preferable to doing nothing and allowing police to search thousands of pages of electronic data without probable cause or a warrant," id. at 58. See also Orso, Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence, 50 Santa Clara L.Rev. 183, 223–24 (2010) (for "older generation cellular phones," a "workable standard" is to allow search incident to arrest for "coding information": but not "content-based information," while for "smart phones" no search incident arrest should be allowed); Notes, 43 Creighton L.Rev. 1157 (2010) (opposing search of cell phones incident to arrest); 42 Ga.L.Rev. 1165, 1203 (2008) ("given cell phones' vast storage capacity, searches of them should be viewed as increasingly invasive and, therefore, unreasonable as their capacities continue to expand"); 38 Hastings Const.L.Q. 169 (2010) (as for "smart phones," as distinct from ordinary cell phones, rule should be that search incident arrest requires exigent circumstances); 35 Okla. City U.L.Rev. 445 (2010) (would either require search warrant or limit search incident arrest to when reasonable belief evidence of crime of arrest would be found on phone); 2010 U.Ill.L.Rev. 685, 715 (favors rule whereby "officers may be permitted to search a cell phone provided they have probable cause as to the contents' incriminating nature").

[67.9]State v. Smith, 124 Ohio St.3d 163, 920 N.E.2d 949 (2009), discussed in Engel, Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices, 41 U.Mem.L.Rev. 233 (2010). The *Smith* approach is viewed with favor in Comment, 61 S.C.L.Rev. 843 (2010).

[67.10]Significantly, the *Smith* court did not limit its holding to a so-called "smart phone," reasoning "that in today's advanced technological age many 'standard' cell phones include a variety of features above and beyond the ability to place phone calls. Indeed, like Smith's phone, many cell phones give users the ability to send text messages and take pictures. Other modern 'standard' cell phones can also store and transfer data and allow users to connect to the Internet. Because basic cellphones in today's world have a wide variety of possible functions, it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly."

[67.11]Consider State v. Carroll, 322 Wis.2d 299, 778 N.W.2d 1 (2010) (where after traffic stop officer lawfully told defendant to drop item suspected of being a weapon, and it turned out to be a cell phone which, when lying open on the ground, displayed an image of defendant smoking a marijuana blunt, that a lawful plain view, but as to officer's later checking of image gallery and finding

images of illegal drugs, firearms and cur
view justified the officer in continuing to
was obtained but did not justify the sub
images because there were no exigent ci
immediate danger of disappearing"; howe
cell phone when it rang was proper, as t
an incoming call to such a phone would
ity," and had the phone not been answer
is likely to be lost, as there is no guarante
leave a voice mail or otherwise preserve

*(Add new footnote 87.1 betwee
text following footnote number 87)*

[87.1]But consider the contrary view i
Internal Revenue Code or Body of Prin
(2006): "The *Robinson* Court never con
been more consistent with *Chimel*: i.e., (
rested person for weapons and search
could get a weapon, (2) once an officer
weapon or has disarmed the suspect, th
container for evidence as long as there i
dence and the suspect remains capable c
the contents; and (3) thereafter, the offi
before a magistrate in order to seek a w

n. 135.

The *Mota* conclusion was rejected i
S.Ct. 1598, 170 L.Ed.2d 559 (2008), disc

*(Add new text at end of paragr
ing footnote number 143)*

(Given that result in *Atwater, Virginia v. Moore*,[143.1] the Court result, as a Fourth Amendmen required use of the citation alte that case.)

[143.1]Virginia v. Moore, 553 U.S. 164,
discussed in § 1.5(a), (b).

n. 145.

The *Mota* conclusion was rejected i
S.Ct. 1598, 170 L.Ed.2d 559 (2008), disc

*(Add new footnote 166.1 betwe
text following footnote number 1*

[166.1]The unqualified authority grant
Gant, __ U.S. __, 129 S.Ct. 1710, 173 L.
there is either "the possibility of access'
hood of discovering offense-related evid

*(Add new footnote 175.1 betw
lowing footnote number 175)*

[175.1]*Evans* was distinguished in Belo

id 977 (7th Cir.1996); United States v. Reyes, nited States v. Lynch, 908 F.Supp. 284 (D.V. F.Supp. 531 (N.D.Cal.1993).

89–90 (2008). See United States v. Curtis, d States v. Murphy, 552 F.3d 405 (4th Cir. 7 F.3d 250 (5th Cir.2007); United States v. 2008); United States v. Mercado-Nava, 486 ed States v. Dennis, 2007 WL 3400500 (E.D. lth 84, 119 Cal.Rptr.3d 105, 244 P.3d 501 lo not support the view that whether police g an item they have properly seized *from an* ful custodial arrest depends on the item's storing personal information").

ts the Fourth Amendment, 56 UCLA L.Rev.

27, 29 (2008).
27 (2008).
. 27, 44 (2008). But see the *Murphy* case,

it the courts "most certainly will" apply "the the iPhone," id. at 44, he goes on to discuss latures might adopt to address this problem, out to be "likely preferable to doing nothing isands of pages of electronic data without 58. See also Orso, Cellular Phones, Warrant- r of Fourth Amendment Jurisprudence, 50 10) (for "older generation cellular phones," a rch incident to arrest for "coding informa- ation," while for "smart phones" no search Notes, 43 Creighton L.Rev. 1157 (2010) (op- t to arrest); 42 Ga.L.Rev. 1165, 1203 (2008) acity, searches of them should be viewed as , unreasonable as their capacities continue Q. 169 (2010) (as for "smart phones," as rule should be that search incident arrest Okla. City U.L.Rev. 445 (2010) (would ei- search incident arrest to when reasonable ould be found on phone); 2010 U.Ill.L.Rev. rs may be permitted to search a cell phone s to the contents' incriminating nature"). d 163, 920 N.E.2d 949 (2009), discussed in hones Cause Courts to Reconsider Fourth Devices, 41 U.Mem.L.Rev. 233 (2010). The in Comment, 61 S.C.L.Rev. 843 (2010).

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Wis.2d 299, 778 N.W.2d 1 (2010) (where lefendant to drop item suspected of being a ell phone which, when lying open on the ndant smoking a marijuana blunt, that a later checking of image gallery and finding

images of illegal drugs, firearms and currency, court concludes the prior plain view justified the officer in continuing to hold the phone while a search warrant was obtained but did not justify the subsequent warrantless viewing of other images because there were no exigent circumstances, as the "data was not in immediate danger of disappearing"; however, officer's conduct in answering the cell phone when it rang was proper, as there "more than a fair probability that an incoming call to such a phone would contain evidence of illegal drug activity," and had the phone not been answered "the opportunity to gather evidence is likely to be lost, as there is no guarantee—or likelihood—that the caller would leave a voice mail or otherwise preserve the evidence").

(Add new footnote 87.1 between "feasible" and "Moreover," in text following footnote number 87)

[87.1]But consider the contrary view in Saltzburg, The Fourth Amendment: Internal Revenue Code or Body of Principles?, 74 Geo.Wash.L.Rev. 956, 980 (2006): "The *Robinson* Court never considered an approach that would have been more consistent with *Chimel*: i.e., (1) an officer always may search the arrested person for weapons and search any container from which the suspect could get a weapon; (2) once an officer has determined that a suspect has no weapon or has disarmed the suspect, the officer may only continue to search a container for evidence as long as there is some possibility that it contains evidence and the suspect remains capable of opening the container and destroying the contents; and (3) thereafter, the officer may only seize a container to bring before a magistrate in order to seek a warrant to search it further."

n. 135.

The *Mota* conclusion was rejected in Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008), discussed in § 1.5(a), (b).

(Add new text at end of paragraph after "review," in text following footnote number 143)

(Given that result in *Atwater*, it is hardly surprising that in *Virginia v. Moore*,[143.1] the Court subsequently reached the same result, as a Fourth Amendment matter, even when state law required use of the citation alternative in the circumstances of that case.)

[143.1]Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008), discussed in § 1.5(a), (b).

n. 145.

The *Mota* conclusion was rejected in Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008), discussed in § 1.5(a), (b).

(Add new footnote 166.1 between "occupied" and "Moreover," in text following footnote number 166)

[166.1]The unqualified authority granted by *Belton* was limited in Arizona v. Gant, — U.S. —, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), to situations in which there is either "the possibility of access" at the time of the search or "the likelihood of discovering offense-related evidence."

(Add new footnote 175.1 between "law" and "and," in text following footnote number 175)

[175.1]*Evans* was distinguished in Belote v. State, 411 Md. 104, 981 A.2d 1247

(2009), where an officer on a bicycle in an area known for open-air drug transactions, approached defendant and detected the "extremely strong" odor of marijuana emanating from him. The officer searched defendant and seized a bag of marijuana, but did not arrest defendant, later explaining he "was on bicycle patrol and not able to transport him back to the police department." Two months later defendant was arrested pursuant to an arrest warrant for the marijuana possession. Stating that an "officer's subjective intent to 'arrest' an individual at the time of his encounter is important where an officer's objective conduct does not indicate clearly that a custodial arrest has been made," the court concluded the officers subjective intent "was, at best, ambiguous" in the instant case, as compared with *Evans*, where "members of the task forces photographed, identified and verified the addresses of both Evans and Sykes-Bey while they were detained and before they were released."

(Add new footnote 177.1 between "offenders" and "But," in text following footnote number 177)

[177.1]Indeed, even if the officer lacks discretion because state law *mandates* use of the citation alternative in the case at hand, the officer could again opt for the custodial alternative if there is no state-law exclusionary rule for such a violation, as the officer's violation of such a state law does not violate the Fourth Amendment. See Virginia v. Moore, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008), discussed in § 1.5(a), (b). In such circumstances, the Court in *Moore* concluded, *Knowles* is inapplicable, for the officer *did* make an arrest and "therefore faced the risks that are 'an adequate basis for treating all custodial arrests alike for purposes of search justification.'"

n. 179.

See, e.g., State v. Pulfrey, 154 Wash.2d 517, 111 P.3d 1162 (2005) (after traffic stop and discovery driver's license expired, driver "arrested" and search of car incident to arrest revealed drugs, and officer claimed he "always" arrests for this offense, arrest and search lawful "even assuming that police officers must exercise their discretion when deciding to arrest or to cite and release," as applicable statute says that decision to be made as to a person "arrested," and here no such exercise of discretion necessary "after discovery of evidence of a felony").

n. 194.

This is also the Indiana position, applying the state constitution. Grier v. State, 868 N.E.2d 443 (Ind.2007).

(Add new footnote 200.1 at end of paragraph after "results," in text following footnote number 200)

[200.1]*Hodson* was distinguished in State v. Alverez, 147 P.3d 425 (Utah 2006), because of the "extreme force" used in that case, as compared with the instant case, where the police merely "grabbed [defendant's] arms and bent his body forward to prevent the swallowing of the evidence" and "did not * * * apply any pressure to the throat."

n. 220.

See also Ford v. State, 122 Nev. 796, 138 P.3d 500 (2006) (taking bloody stocking cap and sweatshirt from person of seized murder suspect lawful, as it "immediately apparent to be evidence of a crime").

§ 5.3 Search of the person during post-arrest detention

n. 14.

State v. Saiz, 144 N.M. 663, 191 P.3d 521 (2008).

Substitute for *Becker* case name and 995 F.2d 776 (7th Cir.1993).

n. 15.

State v. Wilkerson, 363 N.C. 382, 683

Compare Commonwealth v. Pierre, 4! (at time of arrest, defendant on police o then put bag in defendant's vehicle and v searched, revealing firearm; held, not a "simply too far removed, physically and t to be considered a contemporaneous searc

n. 16.

United States v. Smith, 549 F.3d 355

n. 18.

See Ward v. State, 903 N.E.2d 946 State, 284 Ga. 304, 667 S.E.2d 65 (2008) der); Young v. State, 283 S.W.3d 854 (Te

n. 24.

Indeed, if the search is of a humiliati ing inside of clothing, but it is not delaye inside the police station, questions may b unreasonably by failing to do enough t United States v. Williams, 477 F.3d 97 therein.

Compare Commonwealth v. Prophete (defendant properly required to remove a arrest, as he first placed within a windo the defendant's privacy").

n. 28.

United States v. St. Pierre, 488 F.3c defendant then wearing, given that it re put on the pants when arrested).

n. 33.

State v. Saiz, 144 N.M. 663, 191 P.3d lawful, as department's "written polices taken from persons in custody").

(Add new footnote 61.1 between lowing footnote number 61)

[61.1]Seizure of an arrestee's personal i is not itself an illegal search. Mansfield v

n. 69.

See United States v. Johnson, 450 F.

n. 74.

State v. Leger, 936 So.2d 108 (La.2 from defendant at booking, police could was evidence relating to murder).

n. 84.

United States v. Murphy, 552 F.3d 4 sor told officer to retain defendant's cell incriminating information"; "once the cel ficers and investigators were entitled to c per *Edwards*); Threadgill v. State, 146 defendant arrested for unauthorized

Appendix B

SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 4th ed.,

LaFave, Wayne, R,

c. 1994, 2011

§ 5.5

(Including the main section followed by the pocket part)

te was established by
f a blood sample is
peatedly noted"[62]; (2)
ntific techniques like
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rved as the justifica-
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blood is drawn from a sex
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y criteria have been met")
l 302, 220 Ill.Dec. 369, 673
).

l in ch. 10.

602, 109 S.Ct. 1402, 103
89), discussed in § 10.2(g).

Cooper v. State, 277 Ga.
l 605 (2003), involving a
r statute, albeit one which
ecause the person was "in-
raffic accident resulting in
or fatalities." That court
gnize a "special needs" ex-
ng that "a primary pur-
atute was "to gather evi-
al prosecution." Also, *Fink*

The court in *Fink* then went on to say that the statute careful limited the testing to instances where the driver's privacy expectation was otherwise reduced, as (i) a person involved in a serious accident does not expect to leave "moments after its occurrence"; (ii) any driver subject to this statute already has a statutory duty to remain at the accident scene to render aid and exchange information with those involved; and (iii) any driver subject to the statute, as a consequence of the ticketing/release process, "is already subject to restrictions" on his freedom of movement. The driver in *Fink*, against whom the state was proceeding two ways, both license revocation and criminal prosecution for driving under the influence, next argued "that the 'special needs' exception to the warrant and probable cause requirement is inapplicable because the chemical test results may be used in a criminal proceeding." The court in response, though admitting that "the Supreme Court has not yet determined whether evidence obtained under the 'special needs' exception may be routinely used in criminal proceedings," decided that if "the admission of chemical test results in a criminal proceedings is incidental to a statute's purpose, application of the 'special needs' exception is not precluded."

Library References

C.J.S. Arrest § 65; C.J.S. Motor Vehicles § 1407; C.J.S. Searches and Seizures §§ 14, 16, 23, 29–30, 32–34, 50, 57–63.

West's Key No. Digests, Arrest ⇐71.1(1), 71.1(8); Automobiles ⇐419; Searches and Seizures ⇐24, 42.1.

§ 5.5 Seizure and Search of Containers and Other Personal Effects

Analysis

Subsec.

(a) Search incident to arrest.
(b) Inventory.
(c) Exigent circumstances.
(d) Search for purposes other than obtaining evidence.
(e) Search following "controlled delivery."
(f) Containers permitting view or inference of contents.

Previous sections in this Chapter have been concerned with the various bases upon which a warrantless search of a person may be conducted. A search is deemed to be "of a person" if it involves an exploration into an individual's clothing, including a further search within small containers, such as wallets, cigarette boxes and the like, which are found in or about such clothing. By contrast, the present section is concerned with seizures and searches directed at containers

may have been placed in some doubt by two intervening Supreme Court decisions, namely, the *Edmond* and *Ferguson* cases summarized in note 59 supra.

and other personal effects which, given the circumstances, do not have this intimate a connection with a person. This includes suitcases and similar containers in the possession of the suspect, and also such containers and other effects which are not in the possession of the suspect at the time the police either seize or search them.[1]

Six possible bases for a warrantless search of containers and other personal effects are discussed herein: (1) search of the object incident to the arrest of its possessor on the ground that it is within his "immediate control"; (2) inventory of the object subsequent to the arrest of its possessor; (3) search of the object on probable cause in exigent circumstances; (4) reasonable search of the object for reasons unrelated to the obtaining of evidence of crime; (5) search following a "controlled delivery" of the object by police or a police agent to a suspect; and (6) search of a container permitting a view or inference of its contents.

(a) Search incident to arrest. Assume that a person has been lawfully arrested for some criminal offense and that thereafter[2] a suitcase belonging to that person is subjected to a warrantless search. The suitcase, it may be further assumed, was in the general vicinity of the place of arrest, perhaps even carried by the arrestee at the time of his arrest. In such a situation, particularly when no showing can be made of probable cause to search the case plus exigent circumstances justifying doing so without a warrant, the question may arise as to whether this search may be properly characterized as a search incident to the arrest, for such a search requires no more justification than that a lawful custodial arrest was made.[3]

In considering this question, it is useful to consider once again the case of *Chimel v. California*,[4] which set new limits upon the permissible scope of a lawful search incident to arrest. It will be recalled that the Court in *Chimel*, after approving search of the arrestee's person, went on to say:

> And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his

§ 5.5

1. Of course, if the container was on the defendant's person at the time of arrest but he then removed it from his person and placed it nearby, the search of the container will still likely be treated as justified as part of the search of the person. Andrews v. State, 40 P.3d 708 (Wyo.2002).

2. This is not to suggest that for search of a container to qualify as a search incident to arrest the formal arrest must precede the search. As is true of search of the person, see § 5.4(a), a search of a container will qualify as incident to a subsequent arrest if the probable cause for the arrest existed prior to the search. State v. Roach, 234 Neb. 620, 452 N.W.2d 262 (1990). But a search of a container cannot be justified as incident to arrest if the probable cause for the contemporaneous arrest was provided by the fruits of that search. Smith v. Ohio, 494 U.S. 541, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990).

3. United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

4. 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

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grip of any of the p
defendant's control if

5. Cf. United States v. N
1344 (4th Cir.1996) (shoulde
time of arrest is subject to
to arrest).

6. 492 F.2d 1260 (9th
also United States v. Wrigh
(6th Cir.1978) (same res
facts).

7. On the question of v
servation of the container
of its incriminating content
seizure on plain view groun

8. See § 6.3(c).

9. State v. Bracco, 15 O
P.2d 335 (1973). See also N
pett, 265 F.3d 372 (6th C
defendant had duffle bag
when police approached an
feet and started to walk aw
stopped him almost immedia
ed him at same location
searched incident to arrest)
v. Maldonado-Espinosa, 96
Cir.1992) (proper search in
dant's arrest where "carry-
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467, 38 L.Ed.2d 427 (1973).

. 752, 89 S.Ct. 2034, 23
969).

immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

This would suggest that, *at a minimum,* the suitcase or other container must itself be located within that physical area which constitutes the area in the "immediate control" of the arrestee. This may present no problem when the suitcase is being carried by the arrestee,[5] but does under other circumstances. For example, in *United States v. Rothman,*[6] defendant was arrested as he was about to board an airplane and was taken to a room at the airport, after which his checked luggage was retrieved from the airplane and brought to that office and searched there in defendant's immediate presence; the court quite correctly ruled that this search was not incident to the preceding arrest. "The police can not circumvent the Fourth Amendment's warrant requirement by arresting a person and then bringing that person into contact with his possessions which are otherwise unrelated to the arrest."

Another category of case is that in which a suitcase or attache case or similar container is observed by the police within premises near a person who has just been arrested.[7] Here, as with search of premises incident to arrest generally,[8] the better view is that the precise circumstances of the arrest must be evaluated in determining the area within those premises which may be said to be within the arrestee's immediate control. If, for example, the defendant is "not manacled or in the secure grip of any of the policemen," the container is deemed within the defendant's control if he is "within lunging distance" of it.[9] But even if

5. Cf. United States v. Nelson, 102 F.3d 1344 (4th Cir.1996) (shoulder bag carried at time of arrest is subject to search incident to arrest).

6. 492 F.2d 1260 (9th Cir.1973). See also United States v. Wright, 577 F.2d 378 (6th Cir.1978) (same result on similar facts).

7. On the question of whether the observation of the container plus knowledge of its incriminating contents is a basis for seizure on plain view grounds, see § 6.7(b).

8. See § 6.3(c).

9. State v. Bracco, 15 Or.App. 672, 517 P.2d 335 (1973). See also Northrop v. Trippett, 265 F.3d 372 (6th Cir.2001) (where defendant had duffle bag on his shoulder when police approached and place it at his feet and started to walk away when officer stopped him almost immediately and arrested him at same location, bag lawfully searched incident to arrest); United States v. Maldonado–Espinosa, 968 F.2d 101 (1st Cir.1992) (proper search incident to defendant's arrest where "carry-on bag was on the table next to her and within reach"); State v. Brasel, 538 S.W.2d 325 (Mo.1976) (court stresses that attache case was "four feet from the defendant," "was not locked," and "did have a catch but it could be released by merely pushing a button," and the defendant apparently was not yet cuffed).

The same approach is taken as to clothing of the arrestee which is in the vicinity of the arrest. See, e.g., United States v. Cotnam, 88 F.3d 487 (7th Cir.1996) (proper to search "defendant's jacket, which was laying on the bed next to where the defendant was standing" at time of arrest); State v. LeBlanc, 347 A.2d 590 (Me.1975) (defendant arrested while ransacking apartment, jacket eight to ten feet away when he not handcuffed was within his control); Commonwealth v. Wheatley, 266 Pa.Super. 1, 402 A.2d 1047 (1979) (incident to defendant's arrest while at another's apartment, police could seize and search his jacket hanging on kitchen chair, no discussion of how close jacket was to defendant). In People v. Lyda, 27 Ill.App.3d 906, 327 N.E.2d 494 (1975), the court appeared to take a rather broad view of the control requirement in holding the police properly searched the arrestee's jacket though it was hanging on a peg across a rather large room; the arrest occurred in a public place,

the arrestee has been handcuffed, courts are still inclined to find that he might have been able to get at a nearby case,[10] at least if his hands were cuffed in front of him rather than behind him.[11] As is generally true of appellate decisions on the permissible scope of search incident to arrest,[12] the courts are inclined to make the questionable assumption that persons arrested and restrained by police are nonetheless possessed of considerable freedom of movement. In the cases involving search of containers, this attitude is manifested by a reluctance to give particular consideration to the likelihood that the arrestee would have any opportunity to reach the container *and* manipulate the zippers, hasps, or other fastening devices in order to get at a weapon or evidence inside the container. That is, courts generally fail to assess these cases in terms of whether the *interior* of the container is, to use the language from *Chimel*, an "area from within which [the arrestee] might gain possession of a weapon or destructible evidence."[13]

If that is the appropriate inquiry, then it would seem that even if unlocked containers, such as purses, garment bags, attache cases and suitcases, are carried by the person at the time of arrest, they are not inevitably subject to a warrantless search on incident-to-arrest grounds. For example, if two policemen were to approach and seize a man walking through an airport with a suitcase, it is to be doubted that the arrestee would thereafter be in a position to unfasten the several latches on the case and gain access to the contents. This may explain why some courts have not relied upon *Chimel* to justify a search in such an instance, at least if some other ground is available.[14] Yet, most of the pre-*United*

suggesting the court might well have been influenced by the fact the police could not leave the clothing there.

10. United States v. Ciotti, 469 F.2d 1204 (3d Cir.1972) (upholding the district court's finding "that the handcuffs would not prevent [the defendants] from opening the briefcases or of using guns if such were present"); State v. Galpin, 318 Mont. 318, 80 P.3d 1207 (2003) (defendant's coat and duffel bag 4–6 ft. from him at time of arrest lawfully searched incident to defendant's arrest notwithstanding fact he "handcuffed and placed on his knees," as that placed him "in even closer proximity to his coat and duffel bag" and "a man leaning his body and reaching, even with his hands in cuffs, could potentially reach the articles within that range").

11. In United States v. Jones, 475 F.2d 723 (5th Cir.1973), the court noted:

"The answer to this question is obviously dependent on the factual setting at the time of the search. Jones was in handcuffs when the agents opened the suitcase. The record is unclear whether his hands were cuffed in front or behind his back and does not reveal the defendant's location in relation to the suitcase at the time of the search. Both of these facts are relevant to a determination of access to weapons or destructible evidence which is the crucial factor in the *Chimel* analysis.

"For example, if defendant's hands were cuffed in front and he were in close proximity to the suitcase, then the search here could probably be justified under *Chimel*. Even with the presence of numerous FBI agents in the room, we cannot say that it would be unreasonable to believe that Jones might attempt to lay his hands on a weapon located inside the suitcase. But if defendant's hands were cuffed behind him in such a manner that he was denied access to the suitcase, then the search could not be upheld under *Chimel* because the suitcase would not be within his immediate control or within an area from which he might gain possession of a weapon or destructible evidence."

12. See § 6.3(c).

13. More particular in this regard than most of the decisions is State v. Brasel, 538 S.W.2d 325 (Mo.1976).

14. See United States v. Buckhanon, 505 F.2d 1079 (8th Cir.1974) (noting that search of luggage carried at time of arrest

States v. Chadwick[15] that a carried contair sole fact that it was carried container wa search under *United* cation based upon th

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"does not fall squarely v incident to arrest exceptio the search on probable c circumstances grounds States v. Mehciz, 437 F. 1971), noted 9 Hous.L.Rev ing that court was "not u defendant's argument th case carried at time of a *Chimel* rule, and upholdi on probable cause plus stances grounds).

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15. 433 U.S. 1, 97 L.Ed.2d 538 (1977).

16. United States v. 1066 (8th Cir.2002) (pur possession at time of arre v. Garcia, 605 F.2d 349 (7 pered suitcase carried at United States v. Lewis, 5 Cir.1977) (search of unlo ried at time of arrest); Eatherton, 519 F.2d 60 (briefcase carried at time States v. Murray, 492 F 1973) (garment bag carri rest); State v. Culver, 28 1972) (suitcase next to de arrest); People v. Campb 10 Ill.Dec. 340, 367 N. (search of suitcase carri rest); Delacey v. Com

States v. Chadwick[15] cases seemed to rest upon an unstated assumption that a carried container is within the defendant's control by virtue of the sole fact that it was being carried at the time of arrest.[16] It is as if the carried container was an extension of the person and thus subject to search under *United States v. Robinson*[17] without any showing of justification based upon the facts of the individual case.[18]

Whatever might be said concerning an arrestee's access to a carried container at the moment of arrest, it is ordinarily the practice to terminate such access as may exist by taking the container out of the arrestee's possession at that time. Under the *Chimel* rationale, this event might be thought to foreclose any claim that the container could thereafter be searched as an incident to the arrest. However, the pre-*Chadwick* cases rather consistently upheld the search of carried containers on incident-to-arrest grounds even when the search was conducted at some later time when it was unquestionably clear that the arrestee could not get at the contents of the container.[19]

"does not fall squarely within the search incident to arrest exception" and upholding the search on probable cause plus exigent circumstances grounds instead); United States v. Mehciz, 437 F.2d 145 (9th Cir. 1971), noted 9 Hous.L.Rev. 140 (1971) (noting that court was "not unimpressed" with defendant's argument that search of suitcase carried at time of arrest not within *Chimel* rule, and upholding search instead on probable cause plus exigent circumstances grounds).

By comparison, United States v. Eatherton, 519 F.2d 603 (1st Cir.1975), relies primarily upon *Chimel*, noting that the Court in that case cited with approval its prior decision in Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), "in which a search virtually identical to that at issue here was upheld."

15. 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

16. United States v. Sloan, 293 F.3d 1066 (8th Cir.2002) (purse in defendant's possession at time of arrest); United States v. Garcia, 605 F.2d 349 (7th Cir.1979) (zippered suitcase carried at time of arrest); United States v. Lewis, 556 F.2d 385 (6th Cir.1977) (search of unlocked suitcase carried at time of arrest); United States v. Eatherton, 519 F.2d 603 (1st Cir.1975) (briefcase carried at time of arrest); United States v. Murray, 492 F.2d 178 (9th Cir. 1973) (garment bag carried at time of arrest); State v. Culver, 288 A.2d 279 (Del. 1972) (suitcase next to defendant at time of arrest); People v. Campbell, 67 Ill.2d 308, 10 Ill.Dec. 340, 367 N.E.2d 949 (1977) (search of suitcase carried at time of arrest); Delacey v. Commonwealth, 494 S.W.2d 735 (Ky.App.1973) (suitcase dropped at time of arrest); State v. Lohss, 19 Md. App. 489, 313 A.2d 87 (1973) (suitcase carried at time of arrest); People v. Darden, 34 N.Y.2d 177, 356 N.Y.S.2d 582, 313 N.E.2d 49 (1974) (attache case carried at time of arrest); Ferguson v. State, 645 P.2d 1021 (Okl.Crim.App.1982) (canvas bag carried by arrestee is within his immediate control within meaning of *Chimel*); Jones v. State, 640 S.W.2d 918 (Tex.Crim.App.1982) (briefcase carried at time of arrest).

17. 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

18. *Robinson* has been relied upon in order to respond to the contention that when an arrestee is carrying a container and thus has it within his control in the *Chimel* sense, the police should resort to the lesser intrusion of taking the container out of the defendant's control instead of searching it. In United States v. Eatherton, 519 F.2d 603 (1st Cir.1975), the court thought that argument was "not without some logical cogency," but then continued: "Justice Marshall made an argument not unlike that of appellant in his dissent to *Gustafson* and *Robinson* * * *, but while that position may have analytical appeal, * * * it does not presently represent the law."

19. United States v. Schleis, 543 F.2d 59 (8th Cir.1976) (search at station of briefcase carried at time of arrest, though case had to be forced open); United States v. Battle, 510 F.2d 776 (D.C.Cir.1975) (search of carried shopping bag at station); United States v. Johnson, 495 F.2d 378 (4th Cir.1974) (handbag carried at time of arrest); United States v. Kaye, 492 F.2d 744 (6th Cir.1974);

In *Chadwick,* the defendants were arrested while standing next to an open automobile trunk into which they had just placed a double-locked footlocker the agents believed to contain marijuana. The defendants, the car and the footlocker were taken to the federal building, where the agents unlocked and searched the footlocker without a warrant about an hour and a half later. In rejecting the government's contention that this was a lawful search incident to arrest, the Court, per the Chief Justice, reasoned that

> warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest,"[20] or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.
>
> Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest * * *.

It was less than clear, however, whether *Chadwick* afforded any guidance as to what it takes to justify the search of a container as incident to arrest either at the scene of the arrest or thereafter. The *Chadwick* dissenters thought it clear that "the agents could have made a search of the footlocker at the time and place of the arrests" because it then "was within the area of [the defendants'] 'immediate control.'" Brennan, J., concurring, clearly thought otherwise; he concluded that under the reasoning of *Chimel* it could not be said "that the *contents* of the heavy, securely locked footlocker were within the area of their 'immediate control' for purposes of the search incident to arrest doctrine."[21] For the reasons stated earlier, that certainly is a reasonable application of the *Chimel* rule. But, the majority in *Chadwick* seemed to go out of its way to avoid accepting the Brennan reasoning. The Court instead latched onto the *Preston* rule that a search cannot be said to be incident to arrest if it "is remote in time or place from the arrest,"

State v. Lohss, 19 Md.App. 489, 313 A.2d 87 (1973) (suitcase carried at time of arrest); People v. Darden, 34 N.Y.2d 177, 356 N.Y.S.2d 582, 313 N.E.2d 49 (1974) (attache case carried at time of arrest); State v. Kent, 535 S.W.2d 545 (Mo.App.1976) (search at station of three suitcases in possession of arrestee at time of arrest).

Provided that a search of the suitcase at the time of arrest would have been lawful, these cases would seem to be supported by United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), for there the Court stated that a search at the place of detention without a warrant is permissible with respect to those effects "that were subject to search at the time and place of his arrest." However, there is also the question, discussed in § 5.3(a), of whether *Edwards* is limited to a search on probable cause that evidence will be found, in contrast to the *Robinson* rule as to search at the time of the arrest.

20. Citing Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964).

21. Emphasis added.

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22. 415 U.S. 800, 94 L.Ed.2d 771 (1974). The Cc concluded "that once the d fully arrested and is in cus in his possession at the pl that were subject to search place of his arrest may lawf and seized without a warrar substantial period of time tween the arrest and subs trative processing on the or taking of the property for on the other. This is true v ing or effects are immediat arrival at the jail, held ur dant's name in the 'proper jail and at a later time sear for use at the subsequent The result is the same whe is not physically taken fron until sometime after his inc

23. Nor did the Suprem recent explication of *Chadw* Sanders, 442 U.S. 753, 99 L.Ed.2d 235 (1979), addres search in that case was of a from the trunk of the taxi dant was riding when th stopped, and the Court in tioned: "Nor do we consid tionality of searches of lugg the arrest of its possessor. has not argued that respor

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which of course is no longer true in the absolute sense in light of *United States v. Edwards*.[22] The most obvious basis upon which to distinguish *Edwards*, it would seem, would be to stress that *Edwards* only permits at the station what would have been permissible at the time of arrest. The *Chadwick* majority did not employ that distinction, and in this way avoided saying anything about the limits on search of containers incident to arrest and at the time of arrest.[23] What the Court in *Chadwick* did say, albeit only in a footnote, in an effort to dispose of *Edwards* was this:

> Unlike searches of the person, * * * searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest.

Lower courts took this to mean that a *locked* container, to which the arrestee did not have access even at the moment of arrest, cannot be searched then or later on a search-incident-to-arrest theory,[24] that any search of footlockers, suitcases and like containers which occurs at the station well after arrest could not be justified on search-incident-to-arrest grounds,[25] and that any search of such containers at the time and place of arrest was barred, even if the arrestee had access to the contents at the very moment of arrest, whenever the police have (or, could have) first taken exclusive control of the container.[26] (However, the *Robinson*

22. 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). The Court in *Edwards* concluded "that once the defendant is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing on the one hand and the taking of the property for use as evidence on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration."

23. Nor did the Supreme Court's more recent explication of *Chadwick*, Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), address the issue. The search in that case was of a suitcase taken from the trunk of the taxi in which defendant was riding when the vehicle was stopped, and the Court in a footnote cautioned: "Nor do we consider the constitutionality of searches of luggage incident to the arrest of its possessor. * * * The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his 'immediate control' at the time of the search."

24. United States v. Ester, 442 F.Supp. 736 (S.D.N.Y.1977).

25. United States v. Calandrella, 605 F.2d 236 (6th Cir.1979) (search at FBI office of briefcase defendant had been carrying improper, as "there was no further danger that the defendant would secure therefrom either a weapon or an instrumentality of escape, or would destroy evidence contained in the briefcase"); United States v. Schleis, 582 F.2d 1166 (8th Cir. 1978) (search at station of locked briefcase defendant was carrying at time of arrest; court says search incident to arrest authority "evaporates once the officers size the luggage or other personal property and reduce it to their exclusive control"); State v. Southwell, 369 So.2d 371 (Fla.App.1979) (under *Chadwick*, search at station of overnight bag defendant carried at time of arrest not a valid search, incident of arrest).

26. United States v. Calandrella, 605 F.2d 236 (6th Cir.1979) (though search of briefcase at FBI office, court says no right to search "once the agents had seized the item and reduced it to their exclusive control"); United States v. Schleis, 582 F.2d 1166 (8th Cir.1978) (though search here at

search-incident-to-arrest authority was deemed to extend to containers on the person[27] and containers such as a purse[28] which are "immediately associated" with the person.)

Then came *New York v. Belton,*[29] upholding on search-incident-to-arrest grounds the warrantless search of the pocket of a jacket in a car which had minutes before been occupied by the four arrestees. Decrying the lack of a "straightforward rule" on "the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants," the *Belton* majority proceeded to adopt what they perceived as such a rule. Specifically, they held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." But especially noteworthy in the present context is the Court's elaboration of this rule:

> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. * * * Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.

station, court declares that as soon as briefcase was taken from arrestee there was no right to search it without a warrant incident to arrest, as to "otherwise interpret *Chadwick* 'would enable police and federal agents to circumvent the *Chadwick* holding by encouraging them to conduct a search of luggage at the time and location of the seizure in conjunction with a lawful arrest' "); Commonwealth v. Timko, 491 Pa. 32, 417 A.2d 620 (1980) (search of valise at arrest scene not valid search incident to arrest, as defendant was "under the control of the public officers, possibly handcuffed, at the time of the search, and the bag was under the exclusive control of the police officers at the time of the search").

27. United States v. Armstrong, 16 F.3d 289 (8th Cir.1994) (search incident to arrest doctrine allows search of arrestee's wallet); United States v. Passaro, 624 F.2d 938 (9th Cir.1980) (*Chadwick* not applicable to search of wallet incident to arrest); United States v. Ziller, 623 F.2d 562 (9th Cir.1980) (same); Chambers v. State, 422 N.E.2d 1198 (Ind.1981) (*Chadwick* not applicable to wallet, which may be searched at station); State v. Hlady, 43 Or.App. 921, 607 P.2d 733 (1979) (*Chadwick-Sanders* rule "inapposite" to search of wallet found on arrestee's person).

28. Hinkel v. Anchorage, 618 P.2d 1069 (Alaska 1980) (*Chadwick* not applicable to "containers such as purses which are often worn on the person and generally serve the same function as pockets"); Parris v. State, 270 Ark. 269, 604 S.W.2d 582 (1980) (search of purse at station deemed "incidental to the arrest" under *Edwards*); Dawson v. State, 40 Md.App. 640, 395 A.2d 160 (1978) (court upholds search of purse as "analytically akin to a search of items found in an arrestee's clothing or pockets"); State v. Horton, 44 N.C.App. 343 260 S.E.2d 780 (1979) (officer can search "for his own protection" arrestee's pocketbook before handing it to her at station); Carrasco v. State, 712 S.W.2d 120 (Tex.Crim.App. 1986) (defendant's reliance on *Chadwick* misplaced, as defendant's shoulder bag "immediately associated with the person"); Stewart v. State, 611 S.W.2d 434 (Tex.Cr. App.1981) (purse analogized to "a wallet or items found in pockets").

Compare People v. Boff, 766 P.2d 646 (Colo.1988) ("immediately associated" test applies to back pack worn by defendant when he first stopped but not worn at time of arrest).

29. 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

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33. Compare Lee v. State,
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Wash.App. 889, 645 P.2d 63
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Belton does not purport to be a wholesale revision of the *Chimel* rule. Rather, as the Court put it, "our holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic context." This does not mean, however, that *Belton* has adopted a search-incident-arrest rule for containers in vehicles which is not applicable with equal force to containers not in vehicles but possessed by an arrestee.[30] Such a distinction would be inconsistent with the Court's earlier declaration that the Fourth Amendment protection of a container is the same whether it is within or without a vehicle.[31] And it would ignore the fact that the problem giving rise to *Belton,* the asserted need for a "bright line" on what constitutes "immediate control" under *Chimel,* is essentially the same as to containers in cars and other containers.

Though *Belton* is considered more extensively elsewhere in this Treatise,[32] based upon that discussion some conclusions may be stated here concerning its likely application to search of containers incident to arrest: (1) Just as *Belton* applies only to arrest of "the occupant" or "recent occupant" of the vehicle, rather than also to someone merely near it, it does not affect the existing doctrine that a search incident to arrest may not be made of a container which was not even in the arrestee's control.[33] (2) The necessity that the search be "contemporaneous" with the arrest will ordinarily be met if the search is made in the vicinity of the arrest, especially if the arrestee is still there.[34] (3) A

30. See, e.g., State v. Roach, 234 Neb. 620, 452 N.W.2d 262 (1990) (relying on *Belton* in upholding search of defendant's knapsack incident to in-premises arrest, and collecting other cases so relying).

31. Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). However, the *Sanders* holding that a warrant is needed for containers within a vehicle, though not for the vehicle, was later overruled. California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

32. See § 7.1.

33. Compare Lee v. State, 311 Md. 642, 537 A.2d 235 (1988) (bag hanging on fence a few feet away is within control of arrestee); State v. Smith, 119 Wash.2d 675, 835 P.2d 1025 (1992) (where defendant wearing fanny pack but it fell off during struggle attendant arrest, search of it a valid search incident to arrest; "actual physical possession" not necessary and it sufficient, as here, that object "within the control of an arrestee," i.e., "within the arrestee's reach immediately prior to, or at the moment of, the arrest"); with State v. Johnston, 31 Wash.App. 889, 645 P.2d 63 (1982) (after defendant's arrest in office, *Belton* does not allow warrantless search of defendant's purse, found in closet in search with permission of owner of premises).

Of course, an object not in the person's control at the moment of arrest may later come into his control. See, e.g., United States v. Ricks, 817 F.2d 692 (11th Cir. 1987) (defendant arrested at another's apartment asked for his jacket, hanging in closet, so search of jacket pocket incident to arrest proper).

In United States v. Johnson, 846 F.2d 279 (5th Cir.1988), upholding search of a briefcase carried by the arrestee, the court cautioned it "need not decide if *Belton* extends to a situation where a closed container is seized prior to arrest and then searched when the suspect is subsequently arrested."

34. United States v. Nelson, 102 F.3d 1344 (4th Cir.1996) (search of bag minutes after arrest and at place of arrest lawful though defendant in interim had been moved to upstairs room for questioning); United States v. Ortiz, 84 F.3d 977 (7th Cir.1996) (where at scene of defendant's arrest a button on an electronic pager found on his person was pushed, revealing the numeric messages previously transmitted to the pager, this a valid search incident to arrest; court rejects defendant's contention messages should have been suppressed because magistrate had ordered suppression of the numbers retrieved the following day

realistic chance that the arrestee could actually get inside the container, based on specified facts of the particular case, need not be established to justify the search.[35] (4) A search of a container incident to arrest is not

from defendant's wristwatch capable of electronically storing such numbers, as that ruling based on fact search was not contemporaneous with arrest); United States v. Fleming, 677 F.2d 602 (7th Cir.1982) (search was contemporaneous notwithstanding passage of 5 minutes from announcement of arrest and handcuffing of defendant and his movement to the street, though it "is surely possible for a *Chimel* search to be undertaken too long after the arrest and too far from the arrestee's person"); Alston v. United States, 518 A.2d 439 (D.C.App.1986) ("No flat rule exists that a search must be conducted, if at all on the exact spot and at the precise moment where a suspect is first apprehended"; arrest in store parking lot, search into carried tote bag after arrestee and bag taken into store lawful, as it "not 'remote in time or place' from the arrest"); State v. Smith, 119 Wash.2d 675, 835 P.2d 1025 (1992) (where defendant still at arrest scene, 170–minute delay not unreasonable where, as here, "the delay results solely from the officer's reasonable actions designed to secure the premises and to protect herself and the public"). Compare United States v. $639,558.00 in U.S. Currency, 955 F.2d 712 (D.C.Cir.1992) (where defendant arrested on train and search of his bags occurred in railroad station security office at least 30 minutes later, this was not a valid search incident to arrest because it did not "follow[ ] immediately upon" the arrest as in *Belton*); State v. Murray, 135 N.H. 369, 605 A.2d 676 (1992) (search of defendant's purse at scene of arrest illegal; court at one point says this because defendant "had left the scene," though in fact defendant was present but "in an ambulance about to be transported to the hospital" because of injuries suffered in resisting arrest).

But see State v. Sassen, 240 Neb. 773, 484 N.W.2d 469 (1992) (defendant's purse seized at scene of arrest, taken to station and searched there deemed a valid search incident to arrest); State v. Wickline, 232 Neb. 329, 440 N.W.2d 249 (1989) (defendant arrested while sleeping on duffel bag and taken to station, police then returned to scene and picked up bag; search of it at station deemed "incidental to a lawful arrest").

Of course, if the search of the container in the arrestee's control is not made at the arrest scene but instead at the station, then it is likely to be upheld as an inventory search, provided it is done pursuant to an established and routine inventory procedure. In Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983), the Court held that "it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures." But, the added observation in *Lafayette* that a detailed search on the street (as compared to at the station) might be embarrassingly intrusive does not mean that a luggage search on the street is illegal, at least if defendant's personal effects are not strewn about the street. Jones v. Commonwealth, 230 Va. 14, 334 S.E.2d 536 (1985).

35. United States v. Mitchell, 64 F.3d 1105 (7th Cir.1995) (where briefcase "had been in Johnson's control when he was arrested," court does "not believe that Johnson's handcuffing destroyed Lewellen's justification for searching the briefcase"); United States v. Nohara, 3 F.3d 1239 (9th Cir.1993) (re search of bag carried by defendant at time of arrest, "the officers here did not make the search unreasonable by handcuffing Nohara, seating him in the hallway, and searching the black bag within two to three minutes of his arrest"); United States v. Morales, 923 F.2d 621 (8th Cir.1991) (court reads "phrase 'immediate control' to extend beyond the area that is conveniently or easily accessible to the arrestee"); United States v. Tavolacci, 895 F.2d 1423 (D.C.Cir. 1990) ("courts have achieved some degree of clarity, refraining from any slippery test of actual necessity"); Jenkins v. State, 426 So.2d 1305 (Fla.App.1983) (search of purse carried by defendant at time of arrest lawful; fact "the search of the purse occurred while Jenkins was handcuffed a short distance away does not make the search unreasonable"); Savoie v. State, 422 So.2d 308 (Fla.1982) (search of attache case incident to arrest valid under *Belton* without regard to ability of arrestee to reach weapon or destroy evidence); People v. Gokey, 60 N.Y.2d 309, 469 N.Y.S.2d 618, 457 N.E.2d 723 (1983) (though contrary result reached as a matter of state law, court says under *Belton* defendant's duffle bag, within his control at time of arrest, could be searched even though defendant was in handcuffs and surrounded by 5 police officers); Sims v. State, 643 S.W.2d 465 (Tex.App.1982) (search of trash bag lawful though defendant first handcuffed); State v. Smith, 119

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barred on the notion that the police by first seizing it have "exclusive control" of it, for (as the *Belton* majority put it) "under this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.' "[36] (5) If, as the dissenters in *Belton* claim, that case covers "any container * * *, whether locked or not," a suitcase or other container within the arrestee's control may be searched even if locked or otherwise secured from a time preceding the arrest to the time of the search.[37] (6) The search of a container incident to arrest is lawful without regard to how likely, if at all, it was that weapons or evidence of the crime for

Wash.2d 675, 835 P.2d 1025 (1992) ("the fact that Smith was handcuffed in the back of the police car during the search does not make that search unreasonable").

Compare State v. Murray, 135 N.H. 369, 605 A.2d 676 (1992) (under state constitution, search of purse incident to arrest unlawful because defendant then "in an ambulance about to be transported to the hospital," meaning "whatever was in her purse could not at that time have posed a threat to the welfare of the officer, aid her in effecting an escape, or been destroyed by her").

36. United States v. Nelson, 102 F.3d 1344 (4th Cir.1996) (search of bag minutes after arrest and after defendant was moved to another room lawful, as the search-incident-arrest "justification does last for a reasonable time after the officers obtain exclusive control of the container that is to be searched"); United States v. $639,558.00 in U.S. Currency, 955 F.2d 712 (D.C.Cir.1992) (search here invalid because not contemporaneous, but court acknowledges police have "a brief cushion of time within which to search after they have gained complete control"); United States v. Morales, 923 F.2d 621 (8th Cir.1991) (search of bag immediately after police seizure of it incident to arrest valid, as *Belton* "abolishes the exclusive control distinction of *Chadwick*"); United States v. Tavolacci, 895 F.2d 1423 (D.C.Cir.1990) (luggage properly searched incident to arrest where it "in hand or within reach when the arrest occurs"); People v. Boff, 766 P.2d 646 (Colo.1988) (search of defendant's back pack incident to arrest lawful "even where the defendant's access to the objects searched was terminated between the time of arrest and time of the search"); Blackmon v. United States, 835 A.2d 1070 (D.C.App.2003) (where police seized defendant's jacket from roof of car contemporaneously with defendant's arrest while defendant standing by car, "the fact that the jacket was in the actual possession of one of the officers at the time of arrest [does not] mean that it was within the 'exclusive control' of the police, * * * for these terms ('possession' and 'control') are not necessarily synonymous with one another"); Alston v. United States, 518 A.2d 439 (D.C.App.1986) (tote bag carried by arrestee searched incident to arrest notwithstanding "the fact that the bag was carried back to the security office" of a store by a police officer); Ricks v. State, 322 Md. 183, 586 A.2d 740 (1991) (*Belton* allows search incident to arrest of suitcase defendant carrying just before arrest); Lee v. State, 311 Md. 642, 537 A.2d 235 (1988) (by analogy to *Belton*, lawful to search bag taken by officer from fence a few feet from arrestee); Commonwealth v. Madera, 402 Mass. 156, 521 N.E.2d 738 (1988) ("even if the police have taken exclusive control of the container"); State v. Evans, 181 N.J.Super. 455, 438 A.2d 340 (1981) (*Belton* allows search of briefcase defendant kept with him when he got out of car, as *Belton* would allow search of it if he left it in the car); Carrasco v. State, 712 S.W.2d 120 (Tex.Crim.App.1986) (lower court erred in ruling no search incident arrest of defendant's shoulder bag possible after officer took bag from defendant; requirement that defendant must be "physically grasping the repository would be absurd"); State v. Smith, 119 Wash.2d 675, 835 P.2d 1025 (1992) (search of defendant's fanny pack lawful because *Belton* "specifically rejected the argument that the officer's 'exclusive control' * * * rendered the search unconstitutional").

Compare Commonwealth v. Zock, 308 Pa.Super. 89, 454 A.2d 35 (1982) (warrantless search of suitcase defendant carrying while arrested invalid, as before search it "under police control"; no mention of *Belton*).

37. United States v. Tavolacci, 895 F.2d 1423 (D.C.Cir.1990) ("Nor is it significant that the bag had been locked and was opened by defendant only at the direction of the officers").

which the arrest was made would be found.[38] It is to be doubted that such a broad search authority is either necessary or desirable, and thus the criticisms directed elsewhere herein[39] to *Belton* are equally applicable in the present context.

(b) Inventory. A second possible basis upon which to justify a search into containers possessed by an arrestee is the need to inventory them incident to the arrestee's booking and post-arrest detention. Assuming a lawful basis for inventory, such a search requires only a present lawful detention of the defendant; there is no additional need to establish probable cause in the sense of a probability of finding particular items within the container. Moreover, there is nothing about the inventory theory which is tied to the defendant's access to the contents of the container, so that in this sense at least the inventory alternative is somewhat broader than the search-incident-to-arrest alternative.

This is not to say, of course, that an inventory would be proper whenever there is a lawful arrest accompanied by a contemporaneous seizure of a suitcase or other such container belonging to the arrestee. A police inventory of some possession of the arrestee, such as a suitcase, presupposes that the police had some valid reason for taking custody of that object, for it is only because of such taking of custody that the police can be said to have some obligation to safeguard the contents. This presents no problem when a person is arrested in some public place while carrying a suitcase or like object, for it would be clearly improper for the police to simply leave the container unattended at the scene of the arrest.[40] As noted by Justice Blackmun in *United States v. Chadwick:*[41]

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38. Carter v. State, 367 Md. 447, 788 A.2d 646 (2002) (incident to defendant's arrest, police properly searched lunch sack she was carrying and also open package of cigarettes found therein, notwithstanding defense objection no reason to believe latter could contain evidence or weapon); Commonwealth v. Madera, 402 Mass. 156, 521 N.E.2d 738 (1988) ("even if it is unlikely that the search will disclose a weapon or evidence of the crime"); People v. Smith, 59 N.Y.2d 454, 465 N.Y.S.2d 896, 452 N.E.2d 1224 (1983) (*Belton* permits "the search of any closed container taken from the person of, or within the 'grabbable area' accessible to, the person arrested, even though the police have no reason to fear for their safety or to suspect that evidence of the crime for which the arrest is made will be found within the container").

Compare State v. Caraher, 293 Or. 741, 653 P.2d 942 (1982) (applying more strict state standard, arrestee's purse lawfully searched incident to arrest only because reasonable belief it contained drugs).

39. See § 7.1.

40. United States v. Perea, 986 F.2d 633 (2d Cir.1993) (duffel bag defendant transporting while riding in taxi subject to impoundment upon defendant's arrest); State v. Quinn, 565 S.W.2d 665 (Mo.App.1978) (where defendant arrested while sitting on steps of residence, brown paper bag defendant put down as officers approached could be seized for safekeeping). The same is true of the arrestee's wearing apparel. See, e.g., People v. Lyda, 27 Ill.App.3d 906, 327 N.E.2d 494 (1975) (seizure of defendant's jacket, hanging on rack, when he arrested in poolroom); Rankin v. State, 636 So.2d 652 (Miss.1994) (defendant's jacket, "which the officers saw him take off and place on the guard rail beside him" just before his arrest properly taken to station and searched there).

But consider State v. Southwell, 369 So.2d 371 (Fla.App.1979), suppressing evidence found in the inventory of defendant's overnight bag, where the court appears to be influenced by the fact that when defendant was arrested at the airport he asked that he be allowed to place his effects in a rental locker there, but the police talked him out of it. *Southwell* thus seems to be the personal effects equivalent of those cases discussed in § 7.3(c) taking the position that an arrested defendant must be allowed to leave his car at the scene when

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42. United States v. Grill,
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> A person arrested in a public place is likely to have various kinds of property with him: items inside his clothing, a briefcase or suitcase, packages, or a vehicle. In such instances the police cannot very well leave the property on the sidewalk or street * * *. * * * I think it is surely reasonable for the police to take the items along to the station with the arrested person.

Likewise, if a person is arrested in a public place and it is known that he will thereby be prevented from retrieving a suitcase belonging to him which is in the vicinity, perhaps checked aboard a soon-to-depart aircraft, it is again appropriate for the police to take custody of it.[42]

If a person is arrested within private premises, then it is necessary to consider the circumstances of his presence there. If, on the one hand, the defendant is arrested in his own permanent residence, then the police would have no basis for carrying off such objects as suitcases merely because they were observed there at the time of the arrest.[43] As for those cases in which the arrestee is only a transient at the place of arrest, as where the arrest occurs in a hotel or motel room, it is less clear what the duties of the police are. In *Abel v. United States*,[44] the Court

feasible. Compare State v. Cole, 674 P.2d 119 (Utah 1983) (defendant handed his knapsack to a friend at about the time of his arrest, but the police retrieved it with the explanation that all defendant's personal effects must accompany him to the station, and at station drugs found in inventory of knapsack; held, evidence admissible under *Lafayette*, as defendant "has not suggested that [his friend] had withdrawn from the scene to such an extent that the items were no longer under police control"). If the defendant instead disclaims ownership of a nearby container and it is then seized and searched by the police, he may lack standing to object on the ground that he abandoned the container. See United States v. Colbert, 474 F.2d 174 (5th Cir.1973).

41. 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

42. United States v. Grill, 484 F.2d 990 (5th Cir.1973). See also Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (1979) (defendant arrested on the street, after which defendant's companion said he had defendant's effects in his car and did not want to get involved; police properly impounded those effects, as they were "in danger of being left with an unwilling bailee"); Lalande v. State, 676 S.W.2d 115 (Tex.Crim. App.1984) (defendant arrested, proper to inventory bag defendant admitted was his and then being carried by companion, as "at no time did appellant offer, neither does he now contend the officers should have offered, to give his companion custody of the bag while appellant remained in police custody"). But if there is a willing bailee, a police order that this person turn over the arrestee's bailed effects amounts to an "artificially created" need for police inventory, requiring suppression of the evidence found. Gaston v. State, 155 Ga.App. 337, 270 S.E.2d 877 (1980).

43. Cf. State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991) (where defendant arrested at home, no basis for seizure of his jacket seen there). However, it would seem that wherever the defendant is arrested, it is quite proper for the police to require the defendant to don such attire as is appropriate in the circumstances, taking into account the weather conditions. Boardley v. State, 612 A.2d 150 (Del.1992) (where defendant arrested at girl friend's house on "a wintery day," it proper for officer to place defendant's hat on his head, and thus the hat properly inventoried and held at station while defendant in custody).

Under extraordinary circumstances, however, it may be necessary to impound certain articles in the premises for safekeeping. See, e.g., United States v. Lacey, 530 F.2d 821 (8th Cir.1976) (search warrant for drugs executed and occupants then arrested for drug possession, about $700 in currency properly taken to station for safekeeping, as in executing warrant door of apartment was broken and could no longer be secured).

44. 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960).

approved of the agents' actions which led to the defendant taking his luggage and other personal effects with him following his arrest in his hotel room, but it was noted that they allowed him "to choose what he wished to take with him."[45] While it thus may be concluded that the police can impound personal effects incident to such an arrest when the defendant takes the affirmative step of asking that they not be left behind,[46] *Abel* does not indicate what the police are entitled or required to do when the defendant has not taken the initiative in that way.[47] No less than three different views are to be found in the cases. One is that the motel or hotel arrest is to be treated exactly like the at-home arrest, so that the officers have "no greater right to remove or search defendant's personal belongings that were not on his person or within his immediate control than they would have if they had made the arrest in his house."[48] At the other extreme, it has been held that removal of the defendant's effects from his motel room is proper,[49] at least when the defendant does not "offer any objection or suggest any other arrangement for the safekeeping of [his] possessions,"[50] because the hotel or motel management cannot be expected "to permit those belongings to remain indefinitely in the vacated room."[51] The middle ground is that since the law does not "place any responsibility on the [police] for the care of defendant's property located in the motel room" and adequately protects the innkeeper "by statutory provisions limiting the liability of an innkeeper for loss of guests' property," it is only the defendant's interests which are at stake, meaning the police are obligated to give him "the choice of leaving his belongings in the motel room or requesting the [police] to take them into custody for him."[52] In theory, at least, this

45. Under the circumstances in *Abel*, this was not particularly significant, as what the defendant took with him was deemed subject to inspection at the place of detention and what he left behind was deemed abandoned and thus subject to seizure on that basis.

46. United States v. French, 414 F.Supp. 798 (W.D.Okl.1976).

47. The issue is similar to that of whether, when the defendant is arrested while driving a vehicle, the police must inquire whether the defendant wants the car impounded or prefers to leave it parked at the scene or to make some other disposition. See § 7.3(c).

48. United States v. Griffith, 537 F.2d 900 (7th Cir.1976).

49. E.g., State v. Westfall, 446 So.2d 1292 (La.App.1984) (but emphasizing defendant was to be transported to another parish for a serious offense); State v. Rhodes, 337 So.2d 207 (La.1976).

See also State v. Filkin, 242 Neb. 276, 494 N.W.2d 544 (1993) (defendant, arrested in house where she did not reside, not carrying purse at time of arrest, but purse brought to station and inventoried; "it was quite reasonable for law enforcement officials to have retrieved Filkin's purse, for the purse and its contents would assist them in positively identifying Filkin").

50. United States v. Lipscomb, 435 F.2d 795 (5th Cir.1970).

51. Ibid. But in State v. Ruiz, 360 So.2d 1320 (Fla.App.1978), where the motel manager volunteered that he would be willing for defendant's effects to remain in the room where he was arrested, the court held the police seizure of those effects was illegal, and thus suppressed cocaine which fell out of defendant's shoe when it was picked up.

52. Elson v. State, 337 So.2d 959 (Fla. 1976). See also United States v. Lyons, 706 F.2d 321 (D.C.Cir.1983) (court expresses doubts that police have any need to act for their own protection, as it obligation of hotel to decide what to do with defendant's effects once he arrested, but holds only that when "the owner of the goods was present" he must be "asked whether he wished the police to collect them or whether he wanted to make other arrangements for their safekeeping"); Moberg v. State, 810 S.W.2d 190

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middle position seems most reasonable, although in practice it might give rise to frequent after-the-fact disputes about whether the police gave the arrestee his choice and what option the arrestee in fact elected.[53] If that is so, a standardized procedure of taking the arrestee's effects to the station with him (except when he comes forward with a feasible alternative disposition),[54] so they will be immediately available to him upon his release, would seem best, especially if maximum protection is given to his privacy interest in those effects during the period of his incarceration.[55]

Lower courts have quite consistently held that whenever the defendant's suitcase or some similar container was properly impounded by the police at the time of his arrest[56] or otherwise lawfully came into the custody of the police,[57] an item-by-item inventory of its contents at the

(Tex.Crim.App.1991) (court by implication opts for defendant's-choice rule, as court concludes impoundment of effects by police unnecessary given motel policy under which "the motel management would have gathered the property and stored it for at least six months and returned the property if appellant was able to redeem it," and fact defendant "stood mute" at time of arrest must be construed as meaning defendant opted to leave effects in motel's custody; as alternative ground, court notes no "standardized criteria" for such inventory as required by Supreme Court's inventory cases).

53. The problems are likely to be greater here than with respect to the vehicles cases, see note 47 supra, as here the defendant, without a rather detailed explanation, is not likely to realize what his options are.

54. As when another person is in the room, perhaps a co-occupant, and he can assume responsibility for the effects.

55. A somewhat analogous situation has arisen in a military context. As held in State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979) "A search by military authorities in a military billet of a soldier detained by civilian authority, or otherwise absent without leave, to make inventory of his belongings and to secure them for safekeeping pursuant to military regulation without any investigative purposes is not an unreasonable search or seizure proscribed by the Fourth Amendment." After that had been done, the inventorying officers later took another look at certain effects after reading about the defendant's exploits in the newspaper, and this was upheld under the "second look" cases discussed in § 5.3(c).

56. United States v. Perea, 986 F.2d 633 (2d Cir.1993) (duffel bag); United States v. Woolbright, 831 F.2d 1390 (8th Cir.1987) (luggage); United States v. Gallop, 606 F.2d 836 (9th Cir.1979) (purse); Parris v. State, 270 Ark. 269, 604 S.W.2d 582 (1980) (purse); Sumlin v. State, 266 Ark. 709, 587 S.W.2d 571 (1979) (purse); People v. Inman, 765 P.2d 577 (Colo.1988) (purse and containers within); State v. Forbes, 419 So.2d 782 (Fla.App.1982) (purse); Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (1979) ("a shopping bag, open at the top"); State v. Webber, 260 Kan. 263, 918 P.2d 609 (1996) (purse); Commonwealth v. Wilson, 389 Mass. 115, 448 N.E.2d 1130 (1983) (wallet); People v. Guy, 118 Mich.App. 99, 324 N.W.2d 547 (1982) (briefcase); State v. Toto, 123 N.H. 619, 465 A.2d 894 (1983) (*Lafayette* also allows inventory of effects of persons taken into protective custody because intoxicated); State v. Levesque, 123 N.H. 52, 455 A.2d 1045 (1983) (briefcase); State v. Gelvin, 318 N.W.2d 302 (N.D.1982) (defendant here taken into custody for detoxification and not formally arrested); State v. Beaucage, 424 A.2d 642 (R.I.1981) (handbag); State v. Crabtree, 618 P.2d 484 (Utah 1980) (suitcase); Hamby v. Commonwealth, 222 Va. 257, 279 S.E.2d 163 (1981) (briefcase).

57. Items of personal property come into the custody of the police without an accompanying arrest for a variety of reasons. See, e.g., United States v. Markland, 635 F.2d 174 (2d Cir.1980) (officer checked the contents of a plastic zippered beverage bag which fell from a car when it overturned and which officer held for safekeeping when driver taken to hospital; held, inventory proper because contents "might have been perishable, valuable or dangerous," and container was not a suitcase or similar repository of personal effects "inevitably associated with the expectation of privacy" but rather was a beverage bag zipped shut as it would ordinarily be in the course of its normal use for storing food or drink and thus there was nothing "to give objec-

station[58] is permissible. A leading case is *United States v. Lipscomb*,[59] where the court declared:

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tive notice of an expectation of privacy, in view of the nature of the container"). United States v. Diggs, 544 F.2d 116 (3d Cir. 1976) (locked metal box turned over to FBI by person to whom it had been entrusted and who was suspicious of the contents, inventory proper if it determined on remand that this standard FBI practice, but on remand it was determined that there were no standard procedures and that the purpose was investigation rather than inventory, 441 F.Supp. 407 (M.D.Pa.1977), so the evidence was suppressed, 569 F.2d 1264 (3d Cir.1977)); State v. Loyd, 126 Ariz. 364, 616 P.2d 39 (1980) (bus company turned over to police trunk left in rest room without identification; "since the police officer was taking possession of an opened trunk, the usual police interest in guarding against charges of theft and defendant's interest in having his property protected while it is in police custody are present here and support the reasonableness of the inventory"); Rolling v. State, 695 So.2d 278 (Fla.1997) (lawful search of campsite from which defendant fled uncovered money with red dye, apparently taken in recent bank robbery, plus other items, including a tote bag, which was seized; inventory of bag 6 days later "meets the *Opperman* standard"); People v. Sutherland, 92 Ill.App.3d 338, 47 Ill.Dec. 954, 415 N.E.2d 1267 (1980) (police inventory of defendant's clothes proper, as defendant taken to hospital for treatment of gunshot wound and his clothes put in bag and kept by security guard and turned over to police by guard); State v. O'Connell, 726 S.W.2d 742 (Mo.1987) (police may inventory recovered stolen property belonging to defendant and which defendant had earlier reported stolen); State v. Boswell, 111 N.M. 240, 804 P.2d 1059 (1991) (where at station it determined defendant had inadvertently left his wallet in office of store manager, where he arrested for shoplifting, it proper for police to retrieve and inventory the wallet notwithstanding defendant's assertion he would have friend pick it up, as "leaving the wallet in the office, where defendant had no privacy interest or expectation of security and where any number of unknown individuals may have gained access to the wallet, subject to the friend possibly retrieving it at some future time, would be careless police procedure evincing a lack of concern for the defendant's belongings"); State v. Weide, 155 Wis.2d 537, 455 N.W.2d 899 (1990) (proper to inventory purse found in back seat of squad car, as the "government interests served by inventory searches * * * are implicated whether the police lawfully come to possess a container after an arrest or impoundment, or whether, such as happened here, the container comes into police custody by some other lawful means").

Compare State v. Ching, 67 Haw. 107, 678 P.2d 1088 (1984) (where lost containers had been turned over to police, they "may validly search lost property to the extent necessary for identification purposes," but because "the need to search for valuable or dangerous contents is usually not compelling in the lost property situations, a warrantless search for these reasons is valid only if the facts support an objectively reasonable belief that the lost property contains valuable or dangerous contents and that a search of the property was necessary to safeguard the valuables, protect the police from false claims, or negate the danger presented"); People v. Hamilton, 56 Ill. App.3d 196, 14 Ill.Dec. 181, 371 N.E.2d 1234 (1978) aff'd 74 Ill.2d 457, 24 Ill.Dec. 849, 386 N.E.2d 53 (1979) (inventory of attache case found with driver hospitalized after accident improper, as he conscious and thus police had no reason to take custody of the case); Herring v. State, 43 Md. App. 211, 404 A.2d 1087 (1979) (person at police station for questioning left without taking his jacket, "inventory" of contents improper where the officer "knew to whom it belonged and had every reason to expect that the owner would return for it shortly"); State v. Hamilton, 314 Mont. 507, 67 P.3d 871 (2003) ("search of a lost item," here a wallet, "should be by the least intrusive means necessary to identify its owner and secure the property").

58. In People v. Laiwa, 34 Cal.3d 711, 195 Cal.Rptr. 503, 669 P.2d 1278 (1983), search of defendant's tote bag at the arrest scene was claimed by the prosecution to be justified as an "accelerated booking search." The court rejected that view, reasoning that there was no need for a search of such intrusiveness at the scene:

"Finally, we cannot blind ourselves to the practical dangers inherent in the 'accelerated booking search' theory. Both of the above-mentioned intrusions permissible at the time of a lawful arrest—a search incident to the arrest and a patdown in the event of transportation—are restricted in their scope and tailored to their particular justifications. By contrast, as noted above an 'accelerated booking search' would have no such restrictions. If such an exception were recognized, police officers would have

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59. 435 F.2d 795 (5th Cir.1

60. See § 5.3(a).

61. See § 7.4(a).

62. E.g., United States
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It can not be denied that to prevent escape, self-injury, or harm to others, the police have a legitimate interest in separating the accused from the property found in his possession. An inventory is then necessary both to preserve the property of the accused while he is in jail and to forestall the possibility that the accused may later claim that some item has not been returned to him. * * *

Nor are we willing to say that the possibility of a pretextual search is so great in a case such as this that as a matter of law we must condemn the concept of a stationhouse inventory of personal property. Although the situation may indeed arise in which the police, rather than following the strict requirements of *Chimel* for warrantless searches incident to an arrest, simply seize personal property and attempt to search it later under the guise of a stationhouse inventory, that case is not now before us.

As noted elsewhere in this Treatise, some contend that the objectives of inventory may be accomplished by less intrusive methods. It is said that effects found on the person could simply be placed in a sealed container without prior careful scrutiny of them,[60] and that automobiles seized at the time of arrest could simply be locked and guarded.[61] If there is merit to these contentions, then it could be argued with equal force (as some courts held[62]) that a container such as a suitcase could be adequately protected by some similar procedure.[63] For a time, it appeared

a license to conduct an immediate 'thorough search of the booking type' of the person and effects of any individual they arrest without a warrant for a minor but bookable offense, in the hope of discovering evidence of a more serious crime; if such evidence were found, the suspect would be booked instead on the latter charge and the intrusion would be rationalized after the fact as an 'accelerated booking search.' "

Compare United States v. Evans, 937 F.2d 1534 (10th Cir.1991) (defendant argues search of bag at arrest scene rather than at police station shows it was an illegal ruse; court rejects argument, noting police regulation mandating inventory of such effects "does not require officers to conduct their inventory at a particular place").

59. 435 F.2d 795 (5th Cir.1970).

60. See § 5.3(a).

61. See § 7.4(a).

62. E.g., United States v. Monclavo–Cruz, 662 F.2d 1285 (9th Cir.1981) (inventory of contents of purse illegal; "the possibility of a claim against the police over lost or stolen property would be reduced if the purse had been immediately secured without emptying its contents"); People v. Helm, 89 Ill.2d 34, 59 Ill.Dec. 276, 431 N.E.2d 1033 (1981) (inventory of purse unlawful in view of availability of strongbox at station within which purse could have been kept); People v. Bayles, 82 Ill.2d 128, 44 Ill.Dec. 880, 411 N.E.2d 1346 (1980) ("the preservation of defendant's property and the protection of the police from claims of lost or stolen property could have been achieved in a less intrusive manner" by "sealing the suitcase with tape and placing it in a locked locker or storage room"); State v. Pace, 171 N.J.Super. 240, 408 A.2d 808 (1979) ("we see no reason why the case could not be inventoried as 'one locked briefcase bearing initials E.P.' ").

63. So the argument goes, such a procedure adequately protects the contents and also adequately protects the police from unfounded claims. False claims cannot be avoided, and seem more likely when the contents are handled and inventoried (a time when, the owner might later claim, some of his property was taken), as compared to when the container is immediately sealed.

A third reason given in South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), for vehicle inventories was "the protection of the police from potential danger," but, as noted in § 7.4(a), that in itself is hardly a convincing basis for routine vehicle inventories. The same may be said with respect to container inventories. As noted in United States v. Cooper, 428 F.Supp. 652 (S.D. Ohio 1977):

that the Supreme Court might adopt this position.[64] But that approach was rejected by a unanimous Supreme Court in *Illinois v. Lafayette*.[65] At issue there was an inventory search of the arrestee's shoulder bag which disclosed amphetamine pills. In explaining why this less intrusive alternative theory did not compel a different result, the Court stated:

> We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse. It is evident that a stationhouse search of every item carried on or by a person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved.
>
> Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit.[66]

This quite obviously means that inventory officers have "the right to conduct a complete inventory of the defendant's possessions without regard to whether they harbor[ ]any subjective concern that a particular item might contain a dangerous substance which could thereafter threaten jail security or might contain a valuable object for the loss of which the officers could conceivably be held responsible."[67]

Lafayette does not mean that any purported inventory within a suitcase in police custody will be upheld. Just as *South Dakota v.*

"The argument that the search was necessary to avoid a possible booby-trap is also easily refuted. No sane individual inspects for booby-traps by simply opening the container. Had the FBI seriously believed that the suitcases contained bombs or other explosives, it would have undertaken the search in a much more circumspect manner."

64. In South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), the Supreme Court rejected the contention that impounded vehicles could simply be locked and guarded. Yet *Opperman* and the later case of United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), provided some support for the above argument. For one thing, *Opperman* is grounded upon the Court's assertion that there is a diminished expectation of privacy as to automobiles, while in *Chadwick* the Court declared that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile." For another, the Court in *Opperman* rejected the locking-and-guarding alternative because, as Justice Powell explained, "that alternative may be prohibitively expensive, especially for smaller jurisdictions," but in *Chadwick* the Court noted that it is comparatively easy to store safely such items as luggage. That distinction was again emphasized by the Court in the more recent case of Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). Noting the difficulties in safely storing vehicles, the Court asserted that "no comparable burdens are likely to exist with respect to the seizure of personal luggage."

65. 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983).

66. One court, as a matter of state law, rejected the *Lafayette* approach for a time; see State v. Sierra, 214 Mont. 472, 692 P.2d 1273 (1985) (in course of inventory, police "may not, without a specific request from the arrestee, extend to a search and inventory of the contents of any object, closed or sealed container, luggage, briefcase or package"), overruled in State v. Pastos, 269 Mont. 43, 887 P.2d 199 (1994).

67. People v. Inman, 765 P.2d 577 (Colo.1988) (upholding inventory of purse and cosmetics bag and small paper packet within).

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68. 428 U.S. 364, 96 S.
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Opperman[68] only approved of vehicle inventories pursuant to "standard police procedures," the Court in *Lafayette* emphasized that the inventory of containers must be "in accordance with established inventory procedures."[69] "While a written policy is obviously the best means by which to establish the existence of a standardized policy,"[70] the courts are in general agreement that "there is no constitutional requirement that inventory policies be established in writing."[71] To what extent, if at all, these procedures may permit some police discretion as to whether to inventory is not entirely clear. *Colorado v. Bertine*[72] seems to say that the applicable regulations must leave the police with *no* discretion whatsoever as to whether a closed container is to be inventoried.[73] But

68. 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

69. See, e.g., United States v. Diggs, 544 F.2d 116 (3d Cir.1976) (remanding for a determination of what the standard FBI procedure is); United States v. Giles, 536 F.2d 136 (6th Cir.1976) (stressing luggage was inventoried "pursuant to standard police procedure"); Matter of B.K.C., 413 A.2d 894 (D.C.App.1980) (search of brief case, inventory theory rejected where no showing what done was standard police procedure); People v. Bayles, 76 Ill.App.3d 843, 32 Ill.Dec. 433, 395 N.E.2d 663 (1979), aff'd 82 Ill.2d 128, 44 Ill.Dec. 880, 411 N.E.2d 1346 (inventory of suitcase found at accident scene illegal, sheriff had "nothing on paper" as to inventory policy and could not say if policy included opening closed containers); State v. Filkin, 242 Neb. 276, 494 N.W.2d 544 (1993) ("sparse" evidence here sufficient, as is testimony of "a standard procedure" and "clear inference" of testimony was that opening film canister was "in accordance with that standardized procedure").

But if the defendant specifically requested inventory of his effects, he cannot thereafter object that the inventory was not pursuant to established procedures. Thomas v. Hungerford, 23 F.3d 1450 (8th Cir.1994).

If the officer failed to complete the inventory incident to defendant's jailing, that does not render inadmissible objects discovered later for the first time during an inventory done according to "established routine" preparatory for defendant's appearance in court. State v. Grant, 840 A.2d 541 (R.I.2004).

70. State v. Filkin, 242 Neb. 276, 494 N.W.2d 544 (1993). See also State v. Weide, 155 Wis.2d 537, 455 N.W.2d 899 (1990) (written guidelines "may be preferable"). "A primary concern, of course, is the possibility of undetected arbitrariness, a risk which takes on much greater proportions when the supposed 'standardized procedures' are established only by the self-serving and perhaps inaccurate oral statements of a police officer, and are not memorialized in the department's previous written instructions to its officers. Another * * * is that what is represented as department policy may constitute nothing more than a custom, hardly deserving the deference which an actual policy receives." LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich.L.Rev. 442, 456–57 (1990).

71. State v. Filkin, 242 Neb. 276, 494 N.W.2d 544 (1993) (collecting cases in accord).

72. 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987).

73. While the opinion of the Court emphasized "the police department's procedure mandated the opening of closed containers and the listing of their contents," a three-Justice concurrence stated in no uncertain terms that "it is permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle." The two dissenters surely would settle for nothing less, and thus *Bertine* may be read as standing for the proposition that a *total* absence of police discretion on this aspect of inventory is mandated as a Fourth Amendment matter so that (as the concurrence put it) "inventory searches will not be used as a purposeful and general means of discovering evidence of crime."

See Commonwealth v. Rostad, 410 Mass. 618, 574 N.E.2d 381 (1991) (police department policy "that the officer-in-charge or an officer designated by him shall search the arrestee and make an inventory of all items collected" was not "explicit enough to guard against the possibility that police officers would exercise discretion with respect

dictum in the more recent case of *Florida v. Wells*,[74] strongly objected to by four members of the Court,[75] says that police "may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself."[76]

In *Opperman* the Court emphasized that there was "no suggestion" that the inventory "was a pretext concealing an investigatory police motive." (This is similar to the observation in the vehicle inventory case, *Bertine*, that "there was no showing that the police * * * acted in bad faith or for the sole purpose of investigation," and thus, as was more recently said of the *Bertine* language by the Supreme Court, is a proper exception to the prevailing Fourth Amendment doctrine that police conduct is not made invalid by alleged pretexts because subjective intent is irrelevant in determining what is reasonable under the Amendment.[77]) This means that if there is some showing that a certain inventory was a subterfuge, as where only suspicious items are scrutinized and the other contents are not removed and inventoried,[78] the evidence must be suppressed. But if police regulations mandate inventory of the container, so that it would have occurred in any event, evidence found in the inventory need not be suppressed merely because the police also had an investigatory motive.[79] It must also be remembered that the deciding vote in *Opperman* was supplied by Justice Powell and that he articulated a limit which is equally apropros to container inventories, namely, that

to whether to open closed wallets and handbags as part of their inventory searches"). Compare State v. Filkin, 242 Neb. 276, 494 N.W.2d 544 (1993) (*Bertine* interpreted to mean "that the applicable regulations must leave police with little discretion as to whether a closed container is to be inventoried").

74. 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990).

75. See the concurring opinions of Brennan (joined by Marshall), Blackmun and Stevens, JJ.

76. *Bertine* and *Wells* both involved inventory of containers found within impounded vehicles and thus are discussed in greater detail in § 7.4(a).

77. Whren v. United States, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), discussed in § 1.4(f).

78. United States v. Cooper, 428 F.Supp. 652 (S.D.Ohio 1977); Herring v. State, 43 Md.App. 211, 404 A.2d 1087 (1979) (inventory of jacket inadvertently left at station by owner improper for lack of good faith; "The failure to list the jewelry or even prepare an inventory sheet is hardly supportive of his statement regarding the purpose for which he searched the jacket"); Rice v. State, 113 Nev. 425, 936 P.2d 319 (1997) (inventory of arrestee's backpack a pretext, as officer admitted he was "looking for contraband," and there "also no indication in this record that a formal inventory was prepared at the time of arrest").

Compare State v. Weide, 155 Wis.2d 537, 455 N.W.2d 899 (1990) ("discontinuance of the inventory when contraband is found does not invalidate an otherwise valid inventory search").

On the other hand, if proper procedures are followed, "even some suspicion that contraband will be found will not void an otherwise valid inventory search." Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (1979).

79. United States v. Bowhay, 992 F.2d 229 (9th Cir.1993). For further discussion of this point, see § 1.4(f).

An unusual case in this regard is State v. Newman, 250 Neb. 226, 548 N.W.2d 739 (1996), where defendant's suitcases were inventoried as bulk property without examination of the contents, contrary to the usual policy, but later opening of the suitcases was prompted by notice from another police department that certain clothing of the defendant was needed as evidence. The court held that such opening could not be justified as an inventory, as "officers were clearly engaged in a purposeful search for incriminating evidence."

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82. See § 5.3(d).

the police may not scrutinize letters, checkbooks and similar items that "touch upon intimate areas of an individual's personal affairs."[80] The court in *Lafayette* did not have occasion to address the latter two points.[81]

Finally, it must be remembered that if the container was impounded incident to the defendant's arrest and is inventoried as an incident of his post-arrest detention, the inventory should be upheld only if the defendant's custody *at that time* is lawful. This means that the inventory is unlawful if the detention is then unjustified, either because the prior probable cause for the arrest has dissipated or because the arrestee was not afforded his right to obtain stationhouse release.[82] In this regard, it is significant that in *Lafayette* the Supreme Court noted the record was "unclear as to whether respondent was to have been incarcerated after being booked for disturbing the peace," making that "an appropriate inquiry on remand."[83] And even if the defendant's continued custody is lawful, it does not necessarily follow in all instances that *after* the property has been inventoried and secured the police may have the benefit of a "second look."[84]

(c) Exigent circumstances. Another potential basis for upholding a warrantless search of personal effects is that the search in question was made (i) upon probable cause to believe that the effects contained evidence of crime and (ii) when it would not have been practicable to obtain a search warrant first because of certain exigent circumstances. In considering this possibility, it is appropriate to begin with the same general type of case as has been discussed above: where an individual has been placed under arrest[85] and a suitcase or similar such container is in his possession at that time. Assuming probable cause to search the container (which, it must be emphasized, does not inevitably exist merely because there was probable cause to arrest[86]), the question of

80. But see Mooney v. State, 243 Ga. 373, 254 S.E.2d 337 (1979) (inventory of defendant's shopping bag resulting in discovery of incriminating papers; court holds inventory was not too intensive, as folded papers were opened as standard inventory practice because in past razor blades and drugs found within and at this jail prisoners can call for some of their belongings, and papers were "quite short and boldly written" so that word "death" stood out when papers unfolded).

81. The Court did say: "Examining all the items removed from the arrestee's person or possession and listing or inventorying them is an entirely reasonable administrative procedure." But that statement, seemingly broad enough to embrace the situation here under discussion, immediately follows a recitation of several governmental interests served by inventory, none of which necessitate such a close examination.

82. See § 5.3(d).

83. On the other hand, if the defendant was to be incarcerated but, because of items discovered in the inventory, he is instead turned over to authorities of another jurisdiction, this event does not operate retroactively to invalidate the inventory. United States v. Woolbright, 831 F.2d 1390 (8th Cir.1987).

84. See § 5.3(b).

85. To be distinguished from the situation in which the container is in the possession of a person merely detained. See, e.g., United States v. Young, 909 F.2d 442 (11th Cir.1990) (exigent circumstance existed justifying search of bulging purse of woman who fled out back door of residence when police just arrived to execute a search warrant; court rejects argument that police should have detained her under the *Summers* rule, see § 4.9(e), while search warrant obtained).

86. See Waugh v. State, 20 Md.App. 682, 318 A.2d 204 (1974), noting that the

whether there are exigent circumstances may be a matter of some importance. This is particularly the case when the container cannot be said to be in the "immediate control" of the arrestee for search-incident-to-arrest purposes[87] and the search, perhaps because of its timing, intensity or purpose, cannot be justified as an inventory, for then the warrantless search will be lawful only if there were exigent circumstances excusing the failure to obtain a warrant.

If a person is arrested while carrying a suitcase or similar container and it is taken from him and subsequently searched, one would expect the defendant's position to be that once he was under arrest and the container was out of his possession, no exigent circumstances existed, so that the police should have simply held the object until a search warrant could be obtained. Although this position, at least as a matter of logic, is not without substance, it was for some time rather consistently rejected by the courts,[88] which perhaps is not too surprising in light of the fact that the Supreme Court had done likewise in the automobile cases.[89] But this approach was rejected by the Supreme Court in *United States v. Chadwick*.[90] There, the defendants were arrested just after they had placed a locked footlocker in the trunk of a car; they, the vehicle and the locker were then taken to the federal building, where the luggage—reasonably believed to contain marijuana—was searched without a warrant. The government viewed "such luggage as analogous to motor vehicles for Fourth Amendment purposes" and thus deemed *Chambers v. Maroney*[91] to be controlling, but the Court did not agree:

> The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a person's expectations of privacy in personal luggage are substantially greater than in an automobile.
>
> Nor does the footlocker's mobility justify dispensing with the added protection of the Warrant Clause. Once the federal agents had seized it at the railroad station and had safely transferred it to the

facts which justified defendant's arrest (he was carrying suitcases in which marijuana was known to be concealed) also established probable cause to search those containers, and observing that this correlation would not always be present, as where one is "arrested as a draft dodger, rapist, a stock swindler or a scofflaw."

87. But, as a result of the recent decision of New York v. Belton, discussed in the text at note 29 supra, there is much less likely to be a barrier to reliance on a search-incident-to-arrest theory.

88. United States v. Buekhanon, 505 F.2d 1079 (8th Cir.1974); United States v. Payseur, 501 F.2d 966 (9th Cir.1974); United States v. Blair, 366 F.Supp. 1036 (S.D.N.Y.1973); Waugh v. State, 20 Md.App. 682, 318 A.2d 204 (1974); Commonwealth v. Duran, 363 Mass. 229, 293 N.E.2d 285 (1973).

89. See § 7.2.

90. 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), noted in 58 B.U.L.Rev. 436 (1978).

91. 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

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> Boston federal building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. The initial seizure and detention of the footlocker, the validity of which respondents do not contest,[92] were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

In *Chambers*, the Court could "see no difference," for Fourth Amendment purposes, "between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." But in *Chadwick* the Court concluded this could not be said with respect to the footlocker:

> Respondents' principal privacy interest in the footlocker was of course not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement with respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private. It was the greatly reduced expectation of privacy in the automobile, coupled with the transportation function of the vehicle, which made the Court in *Chambers* unwilling to decide whether an immediate search of an automobile, or its seizure and indefinite immobilization, constituted a greater interference with the rights of the owner. This is clearly not the case with locked luggage.

It thus seems clear that the Court would have come out the same way with respect to the absence of exigent circumstances[93] even if the agents had searched the footlocker immediately at the scene of the seizure.[94]

92. Such a seizure may be lawfully made (i) on reasonable suspicion, in which case the limitations of the *Place* doctrine, § 9.87(e), must be complied with; or (ii) on probable cause, which apparently is sufficiently established by a later lawful finding on the same evidence of probable cause to issue a search warrant to search the contents of the container (that is, the deference to the magistrate's finding of probable cause will also operate retroactively to cover the warrantless seizure made for purposes of obtaining a warrant, United States v. Respress, 9 F.3d 483 (6th Cir.1993)), in which case there apparently exists a rather loosely interpreted requirement that the warrant be obtained within a reasonable time. See United States v. Respress, 9 F.3d 483 (6th Cir.1993) (10 hours not unreasonable); United States v. Jodoin, 672 F.2d 232 (1st Cir.1982) (3 days not unreasonable).

93. The *Chadwick* dissenters, Blackmun and Rehnquist, believed that the search would have been lawful if made "on the spot," but apparently on the ground that then it would clearly qualify as a valid search incident to arrest. As to this possibility, see § 5.5(a).

94. See State v. Lewis, 611 A.2d 69 (Me. 1992) (after defendant arrested for driving under influence was released on own recognizance, probable cause arose that there marijuana in bags within his opened carry-on bag; warrantless search of bags illegal because no exigent circumstances, and "the proper procedure would have been to seize the bags and take them to the stationhouse pending issuance of a warrant"); Commonwealth v. Straw, 422 Mass. 756, 665 N.E.2d 80 (1996) (just before his arrest, defendant threw briefcase out window into back yard;

Chadwick was sufficiently ambiguous as to be amenable to either of two interpretations: that the fundamental distinction being drawn by the Court was between luggage and cars, so that *Chadwick* governs even the search of unlocked containers; or that the Court merely refused to apply the *Chambers* rule to a locked container.[95] But this particular uncertainty was laid to rest by the Court in *Arkansas v. Sanders*.[96] There, unlocked luggage was seized from the taxi in which defendant was riding and was then searched on the scene without a warrant. The Court held that *Chadwick* applied. Noting that in *Chadwick* the search was of a 200–lb. double-locked footlocker, while the instant case involved search of a "comparatively small, unlocked suitcase," Powell, J., stated for the majority: "We do not view the difference in the sizes of the footlocker and suitcase as material here; nor did respondent's failure to lock his suitcase alter its fundamental character as a repository for personal, private effects."

The question seemingly settled in *Chadwick*—whether containers are more private than vehicles and thus subject to a general requirement of a search warrant, subject only to certain exceptions including where there are genuine exigent circumstances—may be open to reconsideration in light of *California v. Acevedo*.[97] The holding in *Acevedo*, "that the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle," was based upon what the majority perceived as "the minimal protection to privacy afforded by the *Chadwick–Sanders* rule, and our serious doubt whether that rule substantially serves privacy interests." Most of the reasoning in *Acevedo* is applicable only to containers found within vehicles; the Court felt, incorrectly it would seem,[98] that it was confusing and irrational not to require a warrant when probable cause existed as to a vehicle generally, per *United States v. Ross*,[99] but to require one when the probable cause was limited to a container inside a car. If that is all *Acevedo* is about, then it would seem not to disturb *Chadwick* (as

since this not abandonment under circumstances, trial court erred in concluding exigent circumstances justified immediate search of briefcase, as under *Chadwick* police could only seize the briefcase while a search warrant was sought); Matter of Welfare of G.M., 560 N.W.2d 687 (Minn.1997) (absent plain view of a pouch's contents, "police could not seize [or search] the pouch unless they had both probable cause and a warrant, or, in the alternative, probable cause and a well-delineated exception to the warrant requirement"); State v. Kaiser, 91 N.M. 611, 577 P.2d 1257 (App.1978) (defendant arrested outside his train compartment when dogs trained to alert to marijuana did so there; under *Chadwick*, immediate search of defendant's luggage illegal, police should have simply removed the luggage and taken it to station and then secured warrant).

95. The latter interpretation was supported by this language in *Chadwick*: "By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause."

96. 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

97. 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

98. See § 7.2(d).

99. 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

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Having said that, it must nonetheless be recognized that *Acevedo* in some respects seems to weaken the force of *Chadwick*. One significant portion of the majority's faulty reasoning in *Acevedo* is, in essence, that if police are to be allowed to *seize* containers without a warrant (as *Chadwick* and *Sanders* contemplate), then somehow the protection of *privacy* (i.e., as to the container's contents) "is minimal." That, of course, is wrong, but it either rejects or ignores a central teaching of *Chadwick*. And then there is the separate concurring opinion of Justice Scalia in *Acevedo*, where he forthrightly states that there should *not* be a general warrant requirement applicable to containers.[101] All this prompted the dissenters in *Acevedo* to remind the other Justices that in *Chadwick* the government had made the broad claim that "the Fourth Amendment Warrant Clause protects only interests traditionally identified with the home," and that the Court "categorically rejected that contention, relying on the history and text of the amendment, the policy underlying the warrant requirement, and a line of cases spanning over a century of our jurisprudence."

Another type of case in which the courts have been called upon with some regularity to determine whether exigent circumstances were present is that where the container searched had been placed in the hands of a common carrier for transportation to another place. Illustrative is the pre-*Chadwick* case of *People v. McKinnon*,[102] where two men left five cartons with United Airlines for shipment by air freight from San Diego to Seattle. A suspicious freight agent opened one of the cartons and found that it contained brick-shaped packages; he then summoned the police. The police opened one of these packages and found that it contained marijuana, and then located and arrested the two men in the vicinity, after which they opened the four remaining cartons. The *McKinnon* court upheld this procedure, reasoning:

100. United States v. Doe, 61 F.3d 107 (1st Cir.1995) (where probable cause to search opaque containers found within suitcase during airport inspection, warrantless search—as opposed to warrantless seizure to obtain warrant—not permissible; *Acevedo* overruled *Chadwick* "only as to closed containers seized from inside an automobile"); United States v. Donnes, 947 F.2d 1430 (10th Cir.1991) (*Acevedo* "does not alter the principle that a container discovered inside the home is protected by the warrant requirement of the fourth amendment").

101. "[I]f a known drug dealer is carrying a briefcase reasonably believed to contain marijuana (the unauthorized possession of which is a crime), the police may arrest him and search his person on the basis of probable cause alone. And, under our precedents, upon arrival at the station house, the police may inventory his possessions, including the briefcase, even if there is no reason to suspect that they contain contraband. * * * According to our current law, however, the police may not, on the basis of the same probable cause, take the less intrusive step of stopping the individual on the street and demanding to see the contents of his briefcase. That makes no sense *a priori*, and in the absence of any common-law tradition supporting such a distinction, I see no reason to continue it."

102. 7 Cal.3d 899, 103 Cal.Rptr. 897, 500 P.2d 1097 (1972); commented on in Notes, 41 Fordham L.Rev. 1034 (1973); 58 Iowa L.Rev. 1134 (1973); 5 Sw.U.L.Rev. 286 (1973).

In the language of the United States Supreme Court decisions, "common sense dictates" that when the police have probable cause to believe a chattel consigned to a common carrier contains contraband, they must be entitled either (1) to search it without a warrant or (2) to "seize" and hold it until they can obtain a warrant; absent these remedies, the chattel will be shipped out of the jurisdiction or claimed by its owner or by the consignee. *Chambers* teaches us, however, that in those circumstances there is no "constitutional difference" between the alternatives thus facing the police: an immediate search without a warrant, says the *Chambers* court, is no greater an intrusion on the rights of the owner than immobilization of the chattel until a warrant is obtained, and "either course is reasonable under the Fourth Amendment."

Even before *Chadwick,* some commentators criticized the assumption in *McKinnon* that the alternative of seizure of the container until a warrant is obtained must be rejected because the alternative of holding the car until a warrant could be obtained was not required in *Chambers.* In *Chambers,* it will be recalled, the Court saw the mere seizure of the car as a significant intrusion which would compel "the denial of its use to anyone until a warrant is secured," and declined to require a case-by-case assessment of whether such an intrusion was "greater" or "lesser" than an immediate warrantless search on probable cause. But, so the anti-*McKinnon* argument goes, the same is not true of containers placed with a common carrier, for: (1) "seizure of an item pending the issuance of a warrant does not deprive a citizen of his primary means of transportation, as a car seizure is often likely to do";[103] (2) "if the owner has temporarily parted with possession of the item [by placing it with a carrier], he is likely to suffer no intrusion at all";[104] (3) if, as held in *United States v. Van Leeuwen,*[105] it is reasonable to delay a package placed in the U.S. mails for 29 hours while probable cause is developed and a warrant is obtained, then "it would be if anything as reasonable to delay air freight during the time required to procure a warrant";[106] and (4) the seizure alternative is relatively simple to accomplish in container cases as compared to vehicle cases, as the officer (even if he has also made an arrest) could easily carry off the container or have the cooperative shipper (who, it was noted in *McKinnon,* has the duty "not to knowingly allow its property to be used for criminal purposes") delay its

103. Note, 58 Iowa L.Rev. 1134, 1157 (1973).

104. Ibid.

105. 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970).

106. Note, 41 Fordham L.Rev. 1034, 1043 (1973).

Indeed, the cases permitting a brief seizure of a container on reasonable suspicion "do not control here," where the seizure is initially made on probable cause; even in the latter circumstances, however, the seizure may become unconstitutional "if police act with unreasonable delay in securing a warrant." United States v. Martin, 157 F.3d 46 (2d Cir.1998) (11–day delay not unreasonable on facts of this case, as it included two weekends and Christmas holiday, "which could explain the difficulty in promptly obtained the warrant," and where addressee had low expectation of privacy in stolen goods in package, which he had previously sent to another, and seizure less intrusive where, as here, possession of contents had earlier been relinquished to another).

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dispatch.[107] This type of reasoning, especially as to the last point, was central to the Court's analysis in *Chadwick,* and thus it may be that *Chadwick* also governs in a *McKinnon*-type situation.[108]

It is important to keep in mind, however, that *Chadwick* did not hold that personal effects are *never* subject to search on probable cause without a search warrant; the Court only said that a warrant is required "when no exigency is shown to support the need for an immediate search." One example of such an exigency, given by the Court in *Chadwick,* would be where the object "contained evidence which would lose its value unless the footlocker were opened at once."[109] Another is

107. Ibid.

108. See, e.g., United States v. Martin, 157 F.3d 46 (2d Cir.1998) (because UPS about to deliver stolen goods to defendant "the exigencies of the situation" justified seizure of package "pending issuance of a warrant to examine its contents"); United States v. Respress, 9 F.3d 483 (6th Cir. 1993) (where probable cause defendant's suitcase, not yet reclaimed from airline, contained drugs, police could seize case on probable cause while search warrant obtained); United States v. Villarreal, 963 F.2d 770 (5th Cir.1992) (where drug dog alerted to container in hands of common carrier, immediate warrantless search of it unlawful, as "there was plenty of time to obtain a search warrant"); State v. Randall, 116 Ariz. 371, 569 P.2d 313 (1977) (even if probable cause that luggage checked with airline contained marijuana, *Chadwick* only permits seizure until search warrant obtained); State v. Dunlap, 395 A.2d 821 (Me. 1978) (warrantless search of package which arrived on airplane illegal where police had probable cause and ample opportunity to get search warrant well before flight carrying package arrived); People v. Plantefaber, 410 Mich. 594, 302 N.W.2d 557 (1981) (after luggage which smelled of marijuana removed by police from airline conveyor, there were no exigent circumstances and thus warrant required); State v. Moore, 29 Wash.App. 354, 628 P.2d 522 (1981) (exigent circumstances that they would be shipped out of town allowed warrantless seizure of suitcases at bus station, but warrant needed to search them).

If there is some doubt on this score, it is because it is not entirely clear whether the cartons in *McKinnon* qualify, in expectation-of-privacy terms, for the protections of the Warrant Clause. The Court in *Chadwick* found a "diminished expectation of privacy" as to cars in part because they "periodically undergo official inspection," and noted this was not so as to luggage "except as a condition to a border entry or common carrier travel." It thus might be argued that the defendant in *McKinnon* had a "diminished expectation of privacy" as to the cartons placed with a common carrier, so that *Chambers* rather than *Chadwick* applies.

Compare United States v. Colyer, 878 F.2d 469 (D.C.Cir.1989) (exigent circumstances for seizure *and* search where probable cause to search luggage in roomette of train about to leave station); United States v. Tartaglia, 864 F.2d 837 (D.C.Cir.1989) (same); Green v. State, 334 Ark. 484, 978 S.W.2d 300 (1998) ("the mobility of a bus and its impending departure after each scheduled stop properly place it within the exigent circumstances exception to the warrant requirement," and thus warrantless search of duffel bag on bus lawful); Symes v. United States, 633 A.2d 51 (D.C.App. 1993) (where probable cause mid-journey train passenger's luggage contained drugs, immediate warrantless search lawful, as "the mobility of the train and its impending departure provided the requisite exigent circumstances to justify the officers' deviation from the warrant requirement").

109. Cf. State v. DeLuca, 168 N.J. 626, 775 A.2d 1284 (2001) (where pager of arrested armed robbery suspect sounded tone or vibrated, indicating it had received a page, alerting police to fact that as more messages received earlier ones would be erased, and police knew defendant's apparently armed accomplice was still at large, there were exigent circumstances justifying the officer in scrolling through the pager and retrieving 3 phone numbers as well as times numbers received); State v. Smith, 88 Wash.2d 127, 559 P.2d 970 (1977), upholding the warrantless seizure and examination of defendant's pants at the hospital where he had been taken for mental examination after it appeared defendant had killed his young son, where the court reasoned: "We think the wetness of the pants with sand and mud on them, ostensibly from the creek where the boy was drowned, presented Deputy Lentz with an emergent

where the container is reasonably believed to enclose hazardous materials that might cause harm if there were delay while a warrant was obtained.[110] Yet another possibility, put forward by the *Chadwick* dissenters, is where an immediate search would "facilitate the apprehension of confederates or the termination of continuing criminal activity."[111] This means that if the *Chadwick* rule is otherwise applicable to a *McKinnon*-type case, an immediate search without a warrant would be permissible if the officers had reason to believe that seizing the cartons or otherwise delaying their shipment until a search warrant could be obtained would tip their hand. Illustrative is the pre-*Chadwick* case of *United States v. Ford*,[112] upholding the action of government agents in making a warrantless search on probable cause of a package left for shipment at an airline freight office, and then resealing the package and sending it on its way. The court reasoned:

> But, the officers' failure to obtain a warrant to seize can be excused only if the circumstances at the time of the seizure were sufficiently exigent to make their course of action imperative. * * * We believe that such circumstances existed here. The California officers * * * could have ordered that the substance be detained until a magistrate could issue a warrant to seize it. The time delay required to obtain a warrant, however, might very well have warned the parties to the crime of the government's presence and prevented their apprehension. If the contraband had not been shipped immediately, the

or exigent situation as to which he had to act promptly. Otherwise, the pants could have lost their significance as evidence by being washed, dried, and pressed in a very short time as a routine matter in the hospital laundry at the instance of the ward clerk or someone else. In any event, the pants would have dried out. Obtaining the pants promptly, observing their condition as to wetness, sand, and mud, ostensibly from the creek where the child was drowned, was good police work under these circumstances."

110. State v. Galpin, 318 Mont. 318, 80 P.3d 1207 (2003) (defendant's duffel bag, near defendant at time of arrest, properly seized and searched on exigent circumstances basis, as officers "reasonably suspected Galpin's duffel bag contained equipment and chemicals used in methamphetamine production," chemicals known "to be highly toxic and potentially explosive when mishandled").

111. Cf. United States v. James, 555 F.2d 992 (D.C.Cir.1977) (probable cause defendant had narcotics in his jacket, when police approached defendant handed jacket to his uncle and entered nearby house; held, immediate search of jacket proper, and "was the more reasonable in light of James' retreat, since the officers could thereby ascertain readily whether the game was worth the candle and, if so, give chase").

But in Matter of B.K.C., 413 A.2d 894 (D.C.App.1980), where defendant-shoplifter handed his briefcase to his companion and then fled, and one officer pursued the defendant while another opened the case, the court objected "there is no showing in the record of (1) what the officer thought he would find in the briefcase, (2) why he though what he was looking for would be in the briefcase, or (3) how its contents would have helped the other officers in their pursuit of appellant. We only have the allegation, made for the first time on appeal, that there may have been some identification in the briefcase that could have helped the officers apprehend appellant. Assuming the officer had testified that he opened the briefcase to elicit the suspect's name and address, we cannot say that information would have helped the other officers during the chase. His name and address would only have been helpful if they had lost the suspect and needed the additional information to establish his whereabouts. For this purpose, a slight delay in order to obtain a warrant would have been of little consequence."

112. 525 F.2d 1308 (10th Cir.1975).

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Oklahoma City addressee probably would have become suspicious and remained aloof, and the officers' investigation and arrest process would have proven unproductive. * * * In these circumstances we think the California officers' actions in seizing the package were reasonable and necessary.[113]

A slightly different type of exigent circumstances was recognized in *United States v. Johnson,*[114] where an informant described two persons and said they intended to retrieve two suitcases filled with drugs from two specified lockers at the bus station and then take the drugs to Houston. By surveillance, the police saw the described persons retrieve the suitcases from those lockers, purchase bus tickets to Houston, and then check the two suitcases for the impending journey. Officers then searched the suitcases on probable cause but without a warrant. In upholding the search, the court reasoned:

> In *Chadwick* and *Sanders,* the suspects had already been detained by police at the time the searches were performed. Here, on the other hand, the government had seized defendants' suitcases, but had made no contact with the defendants. Further, these suspects were preparing to leave within minutes on a bus for Houston. At the time the officers needed to act, they faced only two realistic choices. They could either open the suitcases, confirming or dispelling their suspicions, or they could seize Banner and Johnson pending application for a search warrant. Given the circumstances presented, we believe the officers made a reasonable decision in line with the policies underlying the Fourth Amendment. * * *
>
> Our approval of the warrantless search performed here rests on the fact that either course open to the officers, arresting Banner and Johnson or searching their suitcases, would invade some Fourth Amendment interests of the appellants. The *Chadwick* line of cases clearly establishes that searching the suitcases intruded on the suspects' interest in the privacy of their luggage. On the other hand, seizing appellants and holding them until a warrant could be obtained would invade their Fourth Amendment interest in personal privacy and security.

113. See also United States v. De La Fuente, 548 F.2d 528 (5th Cir.1977) (warrantless search of luggage checked by passenger proper, as there was not time to obtain a warrant before the flight departed, and if the agent either arrested the passenger or detained the suitcase "he would frustrate any further efforts to discover the other conspirators in Pittsburgh," where the passenger was headed); People v. Nielsen, 37 Ill.App.3d 1064, 347 N.E.2d 508 (1976) (warrantless search of luggage checked for airline flight proper, as "any delay in the departure of the suitcase might alert its owner that something was wrong and inhibit police effort to arrest him"); Robles v. State, 510 N.E.2d 660 (Ind.1987) (warrantless search of checked luggage of airline passenger lawful, as flight about to leave).

Compare People v. Adler, 50 N.Y.2d 730, 431 N.Y.S.2d 412, 409 N.E.2d 888 (1980) (package shipped via airline searched when it arrived in New York; court rejects "claim of exigency based on the arrival of the flight and the desire to avoid alerting the recipient," as "the argument loses force when viewed in light of the apparent lack of concern for delay, as evidenced by the instruction simply to inform persons inquiring of the package that it had been lost and was being traced").

114. 862 F.2d 1135 (5th Cir.1988).

We do not undertake the metaphysical task of determining the relative intrusiveness of the two alternatives. Nevertheless, we find it impossible to say that searching the suitcases was clearly more intrusive than arresting Banner and Johnson, especially when viewed at the time the police officers acted. By opening the suitcases, the officers could quickly determine the accuracy of the informant's tip. If the report proved ill-founded, the suitcases could be just as quickly closed and loaded on the bus. The entire search would take only seconds. Further, the search would be performed in the back of the bus terminal, with only Officer Stout and the Trailways employee present, away from the inquiring eyes of 50–65 people in the station.

By contrast, detaining the suspects until a search warrant could be obtained might have been highly intrusive. The informant indicated that Banner and Johnson could be armed. Further, many innocent citizens were waiting in the bus station. Thus, the officers probably would have needed to use both surprise and superior force to effect the arrest. * * *

Where officers face no clear answer regarding which of two courses of conduct represents a greater intrusion on citizens' privacy, the Fourth Amendment generally leaves the choice between those alternatives to the discretion of law enforcement officials.

But, while *Chadwick* has an exigent circumstances exception, it must be emphasized that it is quite different from the more loosely defined exigent circumstances of *Chambers v. Maroney*.[115] Because the Court in *Chambers* was unwilling to characterize immediate search as a greater intrusion than seizure and indefinite immobilization, the practical effect was that exigent circumstances requiring seizure also became exigent circumstances justifying a warrantless search of the car. In *Chadwick*, on the other hand, seizure of the container is assumed to be justified when search into its contents is not.[116] Thus, exigencies which can be overcome by mere seizure (or by some other steps, such as posting a guard[117]) do not justify a warrantless search. This means that the characterization of exigent circumstances in pre-*Chadwick* cases, ordinarily employing a *Chambers*-like analysis, can no longer be taken too seriously.[118]

115. 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

116. But, it has been concluded that the mere *seizure* of the package for the purpose of later getting a warrant to search it must itself be justified by both probable cause *and* exigent circumstances. See United States v. Licata, 761 F.2d 537 (9th Cir. 1985).

117. Jones v. State, 648 So.2d 669 (Fla. 1994).

118. Illustrative is United States v. Hand, 516 F.2d 472 (5th Cir.1975). Federal examiner Hale, after finding a shortage of funds during a credit union audit and learning that Mrs. Hand, the officer manager, was implicated in the shortage, was told by Mrs. Hand that she was sending someone to the union office to collect her purses and other personal effects. Having probable cause to believe that the purses contained records relating to the shortage, Hale searched them without a warrant in the union office and found 150 vouchers of evidentiary value. Upholding the search, the court reasoned: "Hale's choices at this juncture were to release the purses unexa-

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Finally, note must be taken once again of the general rule that when personal effects are in plain view and are themselves believed to be of evidentiary value, a warrantless seizure is ordinarily lawful. The cases so holding are discussed at various points in this Treatise, depending upon whether the plain view occurred as a consequence of search warrant execution,[119] entry of premises to arrest,[120] search of a vehicle,[121] or consent search.[122] (These do not exhaust the possibilities; a plain view seizure of personal effects of evidentiary value may also occur, for example, when those effects are viewed on or near the defendant's person rather than within premises or a vehicle in which he has a privacy interest, as where clothing of an injured person at a hospital is seized because it constitutes evidence of a crime committed on or by that person.[123]) Although *Chadwick* would not appear to have any impact on most of these situations, the case is relevant when the object seized as evidence and its contents involve rather distinct privacy interests. For example, had the government in *Chadwick* made the claim, by no means far-fetched, that the footlocker in plain view was subject to seizure as evidence of the crime of possession of marijuana, there is no reason to

mined, to refuse to release them while he contacted regular law enforcement authorities and a warrant issued, or to inspect their contents and be guided by what he found. Probable cause existing, the first course would have been a dereliction of duty. As to the latter two, if Hale's official 'investigative' position was such as to subject him to Fourth Amendment strictures, it was perforce such as to authorize his seizure and immobilizing of the purses. Having the power to seize, in the situation presented, he had the duty to do so. And having seized, the lesser intrusion was to check the purses for Union documents and, if none were found, to release them without more ado [citing *Chambers*]."

After *Chadwick*, the if-you-can-seize-you-can-search reasoning of *Chambers* would no longer be applicable, and the court's assertion that immediate search was a lesser intrusion would seem open to serious question, as in *Chadwick* the Court opted for seizure while a warrant is obtained as the lesser intrusion on the facts there presented. The difficult question, as noted earlier, is what kinds of containers secured in what fashion are to receive the same protection as the locked footlocker which the defendants in *Chadwick* kept in their possession until their arrest. In this connection, consider that the court in *Hand* noted that "though personal handbags imply privacy, the fact that numbers of them were left about the office while she was elsewhere places these in a position little more personal, if at all, than that which would have been held by a closed folder found in the files and marked, say 'K.F. Hand—Personal.'"

119. See § 4.11.

120. See § 6.7.

121. See § 7.5.

122. See § 8.1(c).

123. Chavis v. Wainwright, 488 F.2d 1077 (5th Cir.1973) (defendant was taken to hospital seriously injured from stab wound, police seized his bloody clothing as evidence of the crime, heroin found in inventory of clothing admissible); People v. Miller, 19 Ill.App.3d 103, 311 N.E.2d 179 (1974) (defendant entered hospital for treatment of severe burns, police seized burned remnants of defendant's clothing as evidence of arson committed by defendant); Floyd v. State, 24 Md.App. 363, 330 A.2d 677 (1975) (defendant with multiple gunshot wounds taken to hospital, where police seized his bloody clothing as evidence, heroin found therein admissible).

Compare Jones v. State, 648 So.2d 669 (Fla.1994) (warrantless seizure and search of bag of clothing from hospitalized defendant's hospital room illegal; plain view justification not present, as "the officers had no lawful right of access to the bag of clothing," the contents of which were not apparent, and the incriminating character of the clothes was not "immediately apparent" and did not become apparent until examined later by an expert).

believe the Court would have come out any differently regarding police access to the contents of the footlocker.[124]

Yet another kind of case which also illustrates the need to keep separate and distinct the right of seizure or possession and the right to search is *Walter v. United States*.[125] Private persons opened packages misdelivered to them and found boxes which from their markings appeared to contain obscene films. They turned the packages and boxes over to FBI agents, who screened the films and determined that they were in fact obscene. Stressing "that an officer's authority to possess a package is distinct from his authority to examine its contents," Justice Stevens' opinion[126] concluded that the "fact that FBI agents were lawfully in possession of the boxes of film did not give them authority to search their contents" under the *Sanders-Chadwick* rule when "there were no exigent circumstances."

(d) Search for purposes other than obtaining evidence. In addition to their crime prevention and crime detection responsibilities, police are by design or default called upon to render a great variety of other public services.[127] In carrying out these varied responsibilities, the police sometimes conduct searches for some purpose other than that of finding evidence of criminal activity. Generally, it may be said that the courts have upheld such searches[128] when made reasonably and in good faith, even though evidence of crime is inadvertently discovered as a consequence. This is true as to searches of the person,[129] premises,[130] and vehicles,[131] and also as to searches into personal effects.

An illustration of the latter situation is provided by *United States v. Dunavan*.[132] Passersby found the defendant in a disabled car foaming at the mouth and unable to talk. Police arrived at the scene and arranged for transportation of the defendant to a hospital, after which the passers-by turned over to the police two locked briefcases they had found in the car. In the belief that the briefcases might contain some information as to the defendant's identity or which might be relevant to hospital personnel in determining the nature of the defendant's condition and the best means of treating it, the police obtained the key and opened the briefcases. Therein they found a substantial sum of money which had

124. See, e.g., State v. Jankowski, 281 N.W.2d 717 (Minn.1979) (suitcase lawfully seized on probable cause it an instrumentality of the crime of forgery, i.e., used to transport forged checks and forgery equipment, but warrant still necessary for search of suitcase).

125. 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980).

126. Stevens, J., announced the judgment of the Court and delivered an opinion in which Stewart, J., joined. White, J., filed an opinion concurring in part and in the judgment, which Brennan, J., joined. Marshall, J., concurred in the judgment. Blackmun, J., filed a dissenting opinion in which the Chief Justice and Powell and Rehnquist, JJ., joined.

127. See ABA Standards for Criminal Justice § 1–2.2 (2d ed.1980).

128. Seizure of effects for other purposes is likewise lawful under various circumstances. See, e.g., Cinea v. Certo, 84 F.3d 117 (3d Cir.1996) (levies imposed pursuant to state rules governing postjudgment levy and execution did not violate Fourth Amendment where levying constables had authority to levy on judgment debtors' property, namely, orders of execution from court).

129. See § 5.4(c).

130. See § 6.6.

131. See § 7.4.

132. 485 F.2d 201 (6th Cir.1973).

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been taken in a recent bank robbery. Concluding that the search of the cases was not a pretext but rather was done "as a matter of rendering emergency aid to a person in a seizure," the court held that the search was lawful and that the money was thus admissible in evidence.[133]

The limits of the *Dunavan* rule are illustrated by *People v. Wright,*[134] where an officer at the scene of an accident was handed defendant's purse by a paramedic. At the conclusion of the accident investigation, which established defendant was not at fault, the officer took her purse to the hospital where she was being treated and, upon being informed defendant was then in the x-ray room, opened the purse to seek defendant's driver's license and other information needed to complete his accident report. He found drug paraphernalia therein. In rejecting the state's medical assistance rationale for the search, the court noted the officer

> was not confronted with a situation that posed a threat to the life or safety of the defendant. At the time of the search, the defendant was in the x-ray room of the hospital under the care of trained medical personnel, was conscious and coherent, and, so far as the record suggests, was not seriously injured and was fully able to disclose information that might be useful in her diagnosis and treatment. In addition, the evidence also showed, again without contradiction, that Officer Newell's purpose in searching the defendant's purse was not to obtain information that might possibly have been useful in diagnosing or treating the defendant. On the contrary, the officer's sole purpose in searching the purse was to obtain the defendant's driver's license and other information for inclusion in his investigative report of the accident.[135]

133. See also Evans v. State, 364 So.2d 93 (Fla.App.1978) (driver of car pulled off road, officer approached and saw her eyes wide open, but was unable to communicate with her in any way; search of pocketbook, undertaken to find identifying device which would delineate medical disability which would account for her condition, lawful); Berger v. State, 150 Ga.App. 166, 257 S.E.2d 8 (1979) (it "is not an unauthorized search for hotel management personnel, including security personnel [who are off-duty police officers], to open unlocked items found on their premises in an attempt to determine ownership so that the lost or misplaced property can be returned to its proper owner"). Floyd v. State, 24 Md.App. 363, 330 A.2d 677 (1975) (officer called to shooting found man wounded and unable to talk, he followed ambulance to hospital and there examined victim's clothing after same had been removed from victim and found heroin; held, lawful search to determine identity). On the lawfulness of similar searches by hospital personnel, see State v. Courtney, 25 N.C.App. 351, 213 S.E.2d 403 (1975); Vargas v. State, 542 S.W.2d 151 (Tex.Crim.App.1976); Wagner v. Hedrick, 181 W.Va. 482, 383 S.E.2d 286 (1989) (though no medical emergency, officer properly looked through defendant's clothing at hospital for purpose of finding identification of person involved in motor vehicle accident).

134. 804 P.2d 866 (Colo.1991).

135. Consider also State v. Prober, 98 Wis.2d 345, 297 N.W.2d 1 (1980), holding that the lower court was in error in concluding that a warrantless search of the purse of a person found unconscious and later incoherent came within the medical emergency exception upon a purely objective analysis which would disregard the officer's motive. The court concluded that "conditioning the availability of the emergency doctrine exception on the searching officer's motivation is mandated by the doctrine's rationale that the preservation of human life is paramount to the right of privacy protected by the Fourth Amendment," and thus held that "the test for a

As for the state's second contention, that the search was justified because of "the officer's administrative duty to complete a traffic accident report," the court responded that such "a search * * * must be limited to those situations in which there is no reasonable alternative available to the officer," which was clearly not so in this case.[136]

Similarly, there is authority that police may inventory effects which they find apparently abandoned[137] or which are turned over to them by persons who found them[138] or who by mistake took or received possession of them.[139] Even if such full inventory authority is not granted,[140] courts recognize a police obligation to undertake to find the owner of property they find or which a finder turns over to them,[141] and on this

valid warrantless search under the emergency doctrine requires a two-step analysis. First, the search is invalid unless the searching officer is actually motivated by a perceived need to render aid or assistance. Second, even though the requisite motivation is found to exist, until it can be found that a reasonable person under the circumstances would have thought an emergency existed, the search is invalid. Both the subjective and objective tests must be met." For more on whether the officer's subjective state of mind should be controlling, see § 1.4. See also State v. Newman, 292 Or. 216, 637 P.2d 143 (1981) (search of purse to identify person taken into custody for transportation to detoxification center illegal, as no need for police to know identity); State v. Loewen, 97 Wash.2d 562, 647 P.2d 489 (1982) (following *Prober* approach by which court "must be satisfied both subjectively and objectively that the search was actually motivated by a perceived need to render aid or assistance," court concludes officer's search of tote bag at hospital for identification was unlawful, as at the time "petitioner was being treated by trained medical personnel and was beginning to regain consciousness" and thus a reasonable person would not believe there was then an emergency); Morris v. State, 908 P.2d 931 (Wyo.1995) (when officer brought unsteady and disoriented person to station with his consent and then retrieved his wallet from police car where he had mislaid it and then looked inside and found drugs, search "to ensure Morris' safety and welfare due to his disoriented condition" was unlawful, as "Morris was alert and conscious enough to ask questions, answer questions, and keep his faculties about him").

136. As the court explained, the officer could have asked that the purse be taken to the defendant so that she could retrieve the license, could have asked to speak to the defendant in the x-ray room, or could have asked the hospital admissions office for defendant's name and address.

137. United States v. Sumlin, 909 F.2d 1218 (8th Cir.1990) (where defendant reported robbery of her purse and near crime scene police found a purse, it proper for police to inventory contents to locate valuable contents and identify the owner); United States v. O'Bryant, 775 F.2d 1528 (11th Cir.1985) (*Opperman* inventory doctrine applicable where officer found a briefcase lying by overflowing trash dumpster); State v. D'Amour, 150 N.H. 122, 834 A.2d 214 (2003) (where backpack seized and later inventoried after being found upon revisiting outdoor crime scene, remand necessary to determine that "community caretaking function is not a mere subterfuge for investigation" and that "the inventory search was proper pursuant to the department's standard policy for lost or mislaid property").

138. State v. Pidcock, 306 Or. 335, 759 P.2d 1092 (1988) (police properly examined contents of briefcase found on street by others and turned over to police; "Finders of lost property have a statutory duty to attempt to return the property to its owner. When the finder of the property turned it over to law enforcement officers, on the finder's own initiative, the deputies were placed in the position of the finder").

139. United States v. Rabenberg, 766 F.2d 355 (8th Cir.1985) (suitcase with gun in it turned over to police by person who mistakenly picked it up at airport; proper for police who received it to open package within "so that he might protect all persons concerned from claims of theft and from dangerous instrumentalities").

140. State v. Morton, 110 Or.App. 219, 822 P.2d 148 (1991) (inventory claim rejected).

141. State v. Pidcock, 306 Or. 335, 759 P.2d 1092 (1988).

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v. Morton, 110 Or.App. 219,
(1991) (inventory claim reject-

v. Pidcock, 306 Or. 335, 759
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basis an examination of contents is permissible[142] but only to the extent needed to discover the owner's identification.[143]

(e) Search following "controlled delivery." Sometimes the police will be informed that certain goods in transit contain contraband but, after confirming this information by inspection of those goods, will nonetheless send them on for delivery. If the packages are then picked up by the recipient and he is thereafter arrested, do the police at this point need a search warrant to open those packages and "rediscover" that which they had seen earlier, or is the *Chadwick* warrant requirement not applicable in these special circumstances?

The seminal case on this subject, which has now been followed in many other decisions,[144] is *United States v. DeBerry*.[145] A suspicious employee of Emery Air Freight in Los Angeles opened a suitcase placed with the company for shipment and found fifteen bricks of marijuana within. The Los Angeles police were summoned and shown the marijuana, after which they notified a federal drug agent in New York of their discovery, described to him the bag by its appearance and bill of lading number, and indicated on what flight it would arrive in New York. The federal agent kept the suitcase under surveillance after its arrival. When it was picked up by DeBerry he was followed to the terminal parking lot and, after he placed the suitcase in a car, DeBerry and his companion were arrested and the suitcase was taken from the car and later searched without a warrant. In upholding this conduct by the police, the court reasoned:

> It may be argued that the New York seizure was separate and distinct from the California search, and because there was ample opportunity for the New York officers to obtain a warrant for the suitcase's seizure, its warrantless seizure violated the fourth amendment. * * * This, however, would ignore the facts and realities of the situation. The suitcase was seized initially in California by Sergeant Figelsky of the Los Angeles Police Department. That seizure although done without warrant was legal, because Emery's legal inspection in effect put the marijuana in Figelsky's plain view; he, therefore, could seize the contraband upon sight. * * * Figelsky

142. State v. Belcher, 306 Or. 343, 759 P.2d 1096 (1988).

143. State v. May, 608 A.2d 772 (Me. 1992) (search into lost wallet found in police car illegal, as "the searching officer knew to whom the wallet belonged and was not searching it for purposes of identification"); State v. Morton, 110 Or.App. 219, 822 P.2d 148 (1991) (officer opened purse and discovered several items of identification, so further search into cigarette case unnecessary and illegal; state's claim this was not so because purse had been left behind by female but identification was for "Joe L. Morton" rejected, as one item of identification was a birth certificate indicating that person was a female).

144. United States v. Modica, 663 F.2d 1173 (2d Cir.1981); United States v. Andrews, 618 F.2d 646 (10th Cir.1980); United States v. Bulgier, 618 F.2d 472 (7th Cir. 1980); United States v. Ford, 525 F.2d 1308 (10th Cir.1975); Whittemore v. State, 617 P.2d 1 (Alaska 1980); McConnell v. State, 595 P.2d 147 (Alaska 1979); State v. Edwards, 197 Neb. 354, 248 N.W.2d 775 (1977); State v. Pohle, 166 N.J.Super. 504, 400 A.2d 109 (1979); People v. Adler, 50 N.Y.2d 730, 431 N.Y.S.2d 412, 409 N.E.2d 888 (1980); State v. Billings, 101 Wis.2d 663, 305 N.W.2d 171 (1981).

145. 487 F.2d 448 (2d Cir.1973).

made the seizure by removing one of the bricks of marijuana, marking all of the rest of the bricks with his initials, and finally marking the suitcase itself with his initials. He then authorized the suitcase to be shipped on. Even though the suitcase was then in transit, later in the luggage bin, and later still in the freight room, it remained legally "seized" just as much as if it were under the actual physical control of the police. In fact, except for the time that it was actually in the airplane's belly, it was under the close surveillance of the police. Thus, when the agents and police in New York removed the bag from the back seat of the car appellants were in, they were not making an initial seizure, but rather were merely reasserting control of the suitcase which had already been seized for legal purposes and which was merely being used as bait. Accordingly, no warrant was required.

In the later case of *McConnell v. State*,[146] the court very helpfully enumerated the various facts which must be present to support this result:

> The reasoning in *DeBerry* mandates that its application be limited to the following narrow set of circumstances. First, contraband must be placed in transit from one person to another.[147] Second, the contraband must be initially discovered through lawful means, such as a search by a private person.[148] Third, law enforcement officials must come into lawful possession of the contraband. Seizure of contraband after it is observed in plain view is one method of acquiring lawful possession.[149] Fourth, authorities in

146. 595 P.2d 147 (Alaska 1979).

147. Actually, this really is not essential, as is indicated by United States v. Bulgier, 618 F.2d 472 (7th Cir.1980). There, defendant flew from Los Angeles to Chicago and upon arrival could not locate her luggage and filed a Delayed Baggage Report with the airline. The luggage arrived later, and when defendant could not be reached at the address or telephone number given in the report, airline employees opened the bags in an effort to find other means of contacting the defendant and found cocaine. A federal drug agent was then summoned and saw the cocaine, and another agent maintained surveillance until defendant picked up the luggage a few hours later. The court unhesitantly applied the *DeBerry* rule.

148. On search by private persons, see § 1.8.

149. Exactly what is required at this point has sometimes been a matter of dispute. In State v. Rosborough, 62 Haw. 238, 615 P.2d 84 (1980), a police officer in Los Angeles was summoned to view marijuana airline personnel found in a shipped locker. He confirmed that the contents were marijuana and then had the locker sent on its way. The majority, in refusing to apply *DeBerry* here, saw the instant case as different from that one and many of the others cited in note 144 supra: "In *Andrews, McConnell, Ford* and *DeBerry*, the law enforcement officers who ascertained the contraband nature of the contents of the container performed some act of dominion and control. For example, in *Andrews*, detectives removed some of the cocaine from the plastic bag found in a package presented at an airline cargo service office for shipment. In *McConnell*, the Los Angeles police who had been called to the airport as a result of the discovery by an airline employee of marijuana, took the boxes to the police department where the contents were photographed and tested and two bricks kept as evidence and the box resealed. In *Ford*, the police officer, after confirming that the package contained heroin, marked the package, placed his business card inside it and resealed the package. In *DeBerry*, the officer removed one of the bricks of marijuana from the suitcase and marked the remaining bricks and the suitcase with his initials. There is lacking in the instant case a similar act of dominion and control by the Los Angeles police which would constitute a seizure."

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possession must forward the parcel to authorities at the intended destination[150] under controlled circumstances.[151] Thus, the receiving authorities must have information enabling them to identify the parcel when it arrives, such as a description of the container and its contents. Fifth, the parcel must be under security or under reasonably continuous surveillance by authorities once it arrives at its destination. The reasonably continuous surveillance must continue after the consignee claims the container. Finally, any substantial break in the chain of custody will vitiate the lawfulness of the search.[152]

The "unspoken theses of *DeBerry* is that there is no search or seizure when evidence, once properly seized, is subsequently seized after identification and arrest of persons believed to be committing the crime," as "the reacquisition of the contraband [is viewed] not as a

But the dissenters persuasively reasoned: "When considered in its entirety, the evidence clearly shows that the contraband was under government control from the time it was placed aboard the Honolulu-bound flight until it was recovered by the Honolulu police. It could not have been otherwise. Once the Los Angeles police were brought into the picture and the contents of the footlocker were confirmed by them to be contraband, the airline thereafter was powerless to act with respect to it other than by direction and authorization of the Los Angeles police. Every movement of the footlocker thereafter was by police request and authorization."

See also United States v. Bulgier, 618 F.2d 472 (7th Cir.1980) ("Where, as here, the suitcase with the contraband was never out of the sight of the DEA agents, the marking of the contraband, as done in *Ford* and *DeBerry*, where the contraband was shipped to different states, was not necessary to create the legitimate constructive seizure").

150. Though "most cases invoking the *DeBerry* doctrine have dealt with shipments between federal officers or between local officers within the same state," McConnell v. State, 595 P.2d 147 (Alaska 1979), sometimes, e.g., United States v. Ford, 525 F.2d 1308 (10th Cir.1975), the contraband is sent interstate from one local law enforcement unit to another. "That the identity of the authority exerting control changed upon arrival of the parcel does not signify a break in the police claim of dominion." People v. Adler, 50 N.Y.2d 730, 431 N.Y.S.2d 412, 409 N.E.2d 888 (1980).

151. In State v. Pontier, 103 Idaho 91, 645 P.2d 325 (1982), police viewed the narcotics is a privately-opened package placed with UPS for shipment and then had it sent on to the UPS manager in the delivery city, after which other police had a controlled delivery made to the addressee. The defendant claimed the *DeBerry* rule was not applicable because the package had been relinquished to UPS, but the court responded: "However, it has been held in numerous cases similar to the one at bar that as long as the legally seized contraband is forwarded by law enforcement officials under controlled circumstances, governmental custody of such contraband remains intact." See also United States v. Koenig, 856 F.2d 843 (7th Cir.1988) (*DeBerry* rule applies though package put back into custody of Federal Express, for "as long as the package was shipped in such a manner as to ensure the security of its contents, the further travels of the parcel could do nothing to restore the addressee's lost privacy interest"); State v. Glade, 61 Or.App. 723, 659 P.2d 406 (1983) (*DeBerry* rule applies even though package relinquished to airline for time of flight); State v. Coburn, 165 Vt. 318, 683 A.2d 1343 (1996) (if "there has been no break in the chain of custody," it makes no difference "that defendant's luggage was transferred by Customs officials to the Vermont State Police and that it was shipped from New York to Vermont").

152. The court in *McConnell* added this explanatory footnote: "The time during which the parcel is in transit by use of a regular and reliable means of transportation does not break the chain of custody. * * * Moreover, possession by the consignee or others to whom the consignee delivers the package would not break the chain of custody so long as the parcel remains under reasonably continuous surveillance. Minor gaps in the continuous surveillance, while going to the weight of the evidence, would not bar seizure and later introduction of the contraband into evidence."

second seizure, but rather as a reassertion of physical dominion over evidence already rightfully in the government's possession."[153] A somewhat different approach was taken by the Supreme Court in *Illinois v. Andreas*[154] when it upheld the warrantless reacquisition and reopening of a package after a "controlled delivery" was made. Noting that the initial opening of the package there occurred during a customs inspection, the Court asserted:

> No protected privacy interest remains in contraband in a container once government officers lawfully have opened that container and identified its contents as illegal. The simple act of resealing the container to enable the police to make a controlled delivery does not operate to revive or restore the lawfully invaded privacy rights.
>
> This conclusion is supported by the reasoning underlying the "plain view" doctrine. The plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity. * * * The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy. That rationale applies here; once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost. Consequently, the subsequent reopening of the container is not a "search" within the intendment of the Fourth Amendment.[155]

This dubious analysis drew a strong response from the dissenters,[156] who stressed that the Fourth Amendment protects not only secrecy but also security in effects, that the Court had never before "held that the physical opening and examination of a container in the possession of an individual was anything other than a 'search,' " and that if the reopening was truly no search then it would not (contrary to the majority's assumption) even require probable cause.

Without regard to whether one *really* believes that the later police action is neither a seizure nor a search for Fourth Amendment pur-

153. McConnell v. State, 595 P.2d 147 (Alaska 1979).

154. 463 U.S. 765, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983).

155. Somewhat analogous is United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), discussed in § 1.8(b), where employees of a shipping company opened a suspicious package and found a white powder and then summoned federal drug agents, who upon arrival were invited to reopen the then unsealed package and examine the powder. The Court deemed that limited reopening, because it "enabled the agent to learn nothing that had not previously been learned during the private search" and thus "infringed no legitimate expectation of privacy," to constitute no search at all.

156. Brennan, J., joined by Marshall, J. In a separate dissent, Stevens, J., did not question this branch of the majority opinion.

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poses,[157] it is nonetheless correct to conclude that "the *DeBerry* doctrine is a sensible rule which reasonably accommodates the values protected by the fourth amendment and the interests of effective law enforcement."[158] Even if the taking of the container from the arrestee really *is* a new seizure, that alone is hardly objectionable. Such dispossession occurs anyway as an incident of the arrest,[159] and, as the Supreme Court held in *Arkansas v. Sanders*,[160] the police have "acted properly—indeed commendably—" in seizing a container they have probable cause contains contraband. And even if the opening of the container really *is* a new search, the fact it was made without a search warrant is not objectionable either. This is not because there are exigent circumstances justifying such a search, for under *Sanders* there clearly are not such circumstances.[161] Rather, it is because the earlier viewing of the contents (which could not have changed in the interim) makes the probable cause so certain as to be beyond question, thus obviating the need for a pre-search judicial assessment[162] of whether the police are entitled to open the container.[163]

157. That characterization has not escaped challenge. See the dissent in United States v. Andrews, 618 F.2d 646 (10th Cir. 1980), asserting "that the search by different police in a different state at a different time constitutes a new search."

158. McConnell v. State, 595 P.2d 147 (Alaska 1979).

159. This is not to suggest that a lawful arrest is inevitably essential here. See, e.g., United States v. Jenkins, 876 F.2d 1085 (2d Cir.1989) (undercover agent gave defendant $150,000 in "sting money" for defendant to take out of the country without filing currency reports; though arrest of defendant illegal because no probable cause crime yet occurred, opening suitcase to retrieve the money lawful; court stresses "there was no gap in surveillance" and that "the agents had a significant responsibility to safeguard taxpayer funds").

160. 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

161. As stated in *Sanders*, "the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control."

162. It might be argued, of course, that the search warrant process would provide a pre-search opportunity for the magistrate to determine whether the earlier viewing of the contraband was in fact lawful, but that is not the kind of issue which is likely to be fully ventilated in that context (as compared to at a later suppression hearing). The dissent in United States v. Andrews, 618 F.2d 646 (10th Cir.1980), objects that because under the *DeBerry* rule "there is no search or seizure to be challenged," this means "the addressee has *no point* at which he may assert a violation of his Fourth Amendment rights." But this (perhaps unfortunate) *DeBerry* characterization has not produced this result, for in these cases defendants have been allowed to raise questions about the earlier viewing. And to suggest (as the *Andrews* dissent does) that because recent limits on the standing doctrine might not allow the addressee to object to what was done to the container before he got it, this means a search warrant should be required, is a non sequitur. *If* it is true that there is no standing, then if a search warrant was required there would not even be a need for the magistrate to determine the lawfulness of the prior viewing.

163. That is, this 100% certain probable cause justifies bypassing the usual warrant requirement when the contemplated privacy intrusion is merely into a container then lawfully possessed by the police. It does not itself permit additional warrantless intrusions. Thus, if a car is searched to gain access to the container, as was true in *DeBerry*, that search must be either pursuant to a warrant or found to fall within the *Chambers* warrantless search rule. As for entry of premises to reclaim the package, this would be governed by the rule stated as follows in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971): "Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the ob-

The *Andreas* case is also important on the question of what type of surveillance is necessary to support the warrantless reopening. There the package, a large metal container within which there was a thick wooden table filled with marijuana, was delivered to defendant by undercover officers. Surveilling officers saw him pull the container into his apartment from the hallway and then reemerge with it about 30 to 45 minutes later, at which point he was arrested and the package taken to the station and opened there without a warrant. The lower court held the search was invalid because this hiatus in surveillance meant there was "no certainty" the contents were unchanged, but the Supreme Court disagreed, asserting that

> the mere fact that the police may be less than 100% certain of the contents of the container is insufficient to create a protected interest in the privacy of the container. * * * The issue then becomes at what point after an interruption of control or surveillance, courts should recognize the individual's expectation of privacy in the container as a legitimate right protected by the Fourth Amendment proscription against unreasonable searches.
>
> In fashioning a standard, we must be mindful of three Fourth Amendment principles. First, the standard should be workable for application by rank and file, trained police officers. * * * Second, it should be reasonable; for example, it would be absurd to recognize as legitimate an expectation of privacy where there is only a minimal probability that the contents of a particular container had been changed. Third, the standard should be objective, not dependent on the belief of individual police officers. * * * A workable, objective standard that limits the risk of intrusion on legitimate privacy interests is whether there is a substantial likelihood that the contents of the container have been changed during the gap in surveillance. We hold that absent a substantial likelihood that the contents have been changed, there is no legitimate expectation of privacy in the contents of a container previously opened under lawful authority.[164]

The Court then concluded there was no "substantial likelihood" here given the "unusual size of the container, its specialized purpose, and the relatively short break in surveillance."

The Court's analysis is unconvincing. Whether one views the matter in terms of when a reasonable expectation of privacy reattaches, as the Court does in *Andreas*, or in terms of when the warrant process again becomes meaningful, as suggested herein, certainly a more demanding test—perhaps the "virtual certainty" test proposed by Justice Stevens—is needed. That test is reasonable in the sense of excepting a very special

ject is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."

164. See also United States v. Butler, 904 F.2d 1482 (10th Cir.1990) (no such substantial likelihood here, as though "the jewelry box was outside of police observation for five to ten minutes," it "was designed for the specialized purpose of transporting contraband" under a false bottom, and thus "it was likely that the jewelry box

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case in which added Fourth Amendment restraints are clearly unnecessary, is objective, and is more readily understood by police than (to take Justice Brennan's apt characterization) the "vague intermediate standard" adopted by the *Andreas* majority. (The facts of *Andreas*, it should be noted, are such that the outcome would probably have been the same under a "virtual certainty" test.[165])

It is important to note that the Court in *Andreas* was dealing with a situation in which the police had lawful access to the container. Because that was so, and especially because of the Court's analogy to the plain view doctrine, *Andreas* cannot be read as providing a basis for a warrantless entry into a place in order to search for or seize a container therein previously exposed to the police.[166] Therefore, police acting with an appropriate abundance of caution should ordinarily make use of the so-called anticipatory search warrant.[167] Controlled deliveries, by their nature, are done with advance knowledge of the police, and thus there usually would be no reason why law enforcement officers would be unable to take this precaution.

(f) Containers permitting view or inference of contents. Assume now a fact situation not covered by any of the five previously-discussed categories, so that it initially appears a search warrant will be required to conduct a search of a particular container. Depending upon the nature of the container, it may *still* be true that no warrant is required. Although the law on this container-of-limited-privacy point developed in cases concerned with search of containers within vehicles,[168] it is now relevant only as to search of containers outside of vehicles[169] (and hence is discussed here), as in *California v. Acevedo*[170] the Court ruled that containers within vehicles are subject to warrantless search on probable cause in any event.

Whether the nature of the container determines the need for a warrant came before the Supreme Court in *Robbins v. California*,[171]

contained contraband as long as Butler still possessed it").

165. Stevens, J., in his separate dissent, noted he would remand for a determination under his test, but added that if he had been the trial judge he "would have found that there was virtual certainty that the police officers were correct."

166. See note 162 supra. As stated in United States v. Singh, 811 F.2d 758 (2d Cir.1987), the *Andreas* rule "does not mean that the government should have the general right to make a warrantless search of a private warehouse or dwelling for the purpose of terminating a controlled delivery."

167. See § 3.7(c).

168. See § 7.2(d).

169. "While *Sanders* and *Robbins* [discussed in text following] have both been overruled, we believe that the plain view container exception to the warrant requirement of the fourth amendment remains valid." United States v. Donnes, 947 F.2d 1430 (10th Cir.1991).

170. 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

171. 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981). The case is discussed in Grano, Rethinking the Fourth Amendment Warrant Requirement, 19 Am.Crim.L.Rev. 603 (1982); Kamisar, The "Automobile Search" Cases: The Court Does Little to Clarify the "Labyrinth" of Judicial Uncertainty, in J. Choper, Y. Kamisar & L. Tribe, The Supreme Court: Trends and Developments 1980–1981, at 69 (1982); Katz, Automobile Searches and Diminished Expectations in the Warrant Clause, 19 Am.Crim. L.Rev. 557, 573–83 (1982); Moylan, Further Thoughts on the *Belton* and *Robbins* Decisions, in J. Choper, Y. Kamisar & L. Tribe, The Supreme Court; Trends and Develop-

involving the warrantless search of two packages, each resembling an oversized, extra-long cigar box with slightly rounded corners and edges and wrapped in green opaque plastic and sealed with a strip of opaque tape. Though the state court had upheld the search on somewhat different grounds,[172] before the Supreme Court the state contended "that the Fourth Amendment protects only containers commonly used to transport 'personal effects,' " that is, "property worn or carried about the person or having some intimate relation to the person." But in the *Robbins* plurality opinion, four members of the Court[173] rejected that view:

> The respondent's argument cannot prevail for at least two reasons. First, it has no basis in the language or meaning of the Fourth Amendment. That Amendment protects people and their effects, and it protects those effects whether they are "personal" or "impersonal." The contents of Chadwick's footlocker and Sanders' suitcase were immune from a warrantless search because they had been placed within a closed, opaque container and because Chadwick and Sanders had thereby reasonably "manifested an expectation that the contents would remain free from public examination." * * * Once placed within such a container, a diary and a dishpan are equally protected by the Fourth Amendment.
>
> Second, even if one wished to import such a distinction into the Fourth Amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished. What one person may put into a suitcase, another may put into a paper bag. * * * And as the disparate results in the decided cases indicate, no court, no constable, no citizen, can sensibly be asked to distinguish the relative "privacy interests" in a closed suitcase, briefcase, portfolio, duffle bag, or box.

Justice Stevens also rejected the notion that the Court should "draw distinctions among different kinds of containers," and thus it appeared that a majority of the Court had rejected a nature-of-container distinction.[174]

Any lingering doubts were put to rest in *United States v. Ross*,[175] where the Court declared

> that a constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction

ments 1980–1981, at 113 (1982); Comment, 31 Am.U.L.Rev. 291 (1982); 10 Hofstra L.Rev. 483 (1982); 72 J.Crim.L. & Criminology 1171 (1981).

172. Namely, that the case fell within the *Sanders* footnote 13 exception, discussed in the text following note 177 infra. See People v. Robbins, 103 Cal.App.3d 34, 162 Cal.Rptr. 780 (1980).

173. Stewart, J., joined by Brennan, White and Marshall, JJ.

174. Powell, J., concurring, on the other hand, asserted that a warrant should be required to search a container in a vehicle "only when the container is one that generally serves as a repository for personal effects or that has been sealed in a manner manifesting a reasonable expectation that the contents will not be open to public scrutiny."

175. 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

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perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.[176]

But even after *Robbins* and *Ross* there remains a somewhat different type-of-container issue. The starting point here is footnote 13 of *Arkansas v. Sanders*,[177] where the Court said:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.

This language was quoted with apparent approval by the Court in *Ross*.[178] It was also quoted approvingly by the *Robbins* plurality, which added this further observation:

> The second of these exceptions obviously refers to items in a container that is not closed. The first exception is likewise little more than another variation of the "plain view" exception, since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. The same would be true, of course, if the container were transparent, or otherwise clearly revealed its contents. In short, the negative implication of footnote 13 of the *Sanders* opinion is that, unless the container is such that its contents may be said to be in plain view, those contents are fully protected by the Fourth Amendment.

But not all members of the Court agreed with the plurality's conclusion that the containers in *Robbins* fell outside the footnote 13 exception,[179]

176. Powell, J., while joining the Court's opinion, indicated he still believed "that in many situations one's reasonable expectation of privacy may be a decisive factor in a search case." Marshall, J., joined by Brennan, J., dissenting, on the other hand, made it clear they did not disagree with the majority on this issue. They declared "that closed, opaque containers—regardless of whether they are 'worthy' or are always used to store personal items—are ordinarily fully protected."

177. 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

178. Also, the *Ross* dissenters cited specifically to the *Sanders* footnote 13 in support of their assertion that "closed, opaque containers * * * are ordinarily fully protected."

179. Rehnquist, J., dissenting, concluded that the search in *Robbins* "falls squarely within the [footnote 13] exception." Stevens, J., dissenting, though seem-

thus indicating Justice Blackmun might well be correct in predicting that the exception would "lead to a new stream of litigation."

Perhaps the easiest case is that in which there is unquestionably a plain view in the sense of a direct observation of the contents because the container is partially open or transparent.[180] Assuming the viewing is itself lawful, then if there is probable cause for seizure of what is seen[181] that seizure need not be made pursuant to a warrant merely because the object is inside a container.[182] Similarly, assuming lawful physical con-

ing to prefer a rule which would avoid the necessity for making such distinctions, said: "If containers can be classified on the basis of the owner's expectations of privacy, * * * it would seem rather clear to me that a brick of marijuana wrapped in green plastic would fall in the nonprivate category. I doubt if many dealers in this substance would be very comfortable carrying around such packages in plain view." Neither the Chief Justice, Justice Powell nor Justice Blackmun addressed this precise point.

180. United States v. Ramos, 960 F.2d 1065 (D.C.Cir.1992) (no Fourth Amendment protection where "the plastic bag was transparent"); Prichard v. State, 300 Ark. 10, 775 S.W.2d 898 (1989) ("an open zippered bag or kit from which hypodermic needles were protruding"); Tillman v. State, 275 Ark. 275, 630 S.W.2d 5 (1982) (garment bag partially open, revealing stolen goods); State v. Schrier, 283 N.W.2d 338 (Iowa 1979) (court relied upon the language in footnote 13 of *Sanders* in upholding a warrantless search of a knapsack because a clear plastic bag of marijuana was protruding 2–3" from the knapsack); State v. Wallace, 80 Hawai'i 382, 910 P.2d 695 (1996) ("the forty-three heat-sealed clear plastic packets, which were *incapable* of concealing their contents from plain view, were virtually 'windows' on their contents and, thus, effectively not 'containers' at all"); Commonwealth v. Irwin, 391 Mass. 765, 463 N.E.2d 1178 (1984) (no warrant needed as container so full of marijuana that officer could see color and shape of contents pressed against surface; "contents were in plain view" and thus "no privacy interest was affected by opening the container").

In Blair v. United States, 665 F.2d 500 (4th Cir.1981), this plain view aspect of footnote 13 was utilized with the distinctive configuration part of the footnote, with the result that a warrantless search of closed bales was upheld because these bales had "virtually identical appearances" to others in the same vehicle (there, a boat) which were split open, revealing marijuana within. Similarly, in Adoue v. State, 408 So.2d 567 (Fla.1981), the fact one of several plastic bags was ripped open, revealing marijuana, was deemed to justify search of all of them, though a dissent objects that because "only one bag was ripped" this means "only that bag can reasonably be excluded from the protections of *Robbins*."

Consider also that if the requirements for a "controlled delivery" are met, see § 5.5(e), then the lawful viewing of the contents of the container on a prior occasion will suffice, and no warrant will now be needed to search the container, assuming its discovery in the vehicle is itself lawful. See United States v. Modica, 663 F.2d 1173 (2d Cir.1981). In accord with *Modica* is United States v. Quintero, 848 F.2d 154 (11th Cir.1988). By like reasoning, it has been held that if an undercover agent saw the contents of the container earlier and there has been uninterrupted police surveillance until the time of later seizure of the container, then no search warrant is required. United States v. Corral, 970 F.2d 719 (10th Cir.1992); United States v. Badolato, 710 F.2d 1509 (11th Cir.1983).

181. If there is not probable cause for seizure at this point, then the question can arise here, as in many other contexts, whether a very limited additional inspection of the exposed contents is permissible on reasonable suspicion. See, e.g., United States v. Mannino, 635 F.2d 110 (2d Cir. 1980) (where notebook was protruding from plastic bag on front seat of car of arrested drug dealer, "opening such a book to ascertain its contents and possible evidentiary value was not improper"). But the Supreme Court has taken a contrary position. See Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), discussed in § 4.11(d). Illustrative of the post-*Hicks* approach is United States v. Brown, 79 F.3d 1499 (7th Cir.1996) (where officer only saw "a shiny, chrome object" in bag inside car, there no probable cause object a gun, and thus officer "did not have a lawful right to open the bag").

182. In such circumstances it is as if there were no container, in which case it is clear that a warrantless seizure on probable

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183. United States v. Will
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tact with the container, this "plain touch" may reveal the contents so unquestionably that here as well no warrant requirement exists merely because there is a container between the officer and the seizable object.[183] More likely to arise, however, is the "plain smell" case, where again no warrant is required[184] provided, of course, that the incriminating smell can properly be attributed to the container.[185] This result can be explained as a logical extension of the footnote 13 principle; if one has an insufficient expectation of privacy to invoke the warrant requirement by using containers whose contents "can be inferred from their outward appearance," then the same might well be said of the use of containers which fail to confine incriminating odors.[186] On the other hand, if viewed not simply from the privacy perspective but in terms of the underlying policy judgment as to when something is to be gained by imposing the warrant requirement, such extensions of footnote 13 might be questioned because of the somewhat greater chance of the police jumping to erroneous conclusions in "plain smell" and "plain touch" cases. (In *United States v. Johns,*[187] the Court declared it was "debatable" that the

cause is lawful. See, e.g., State v. Williams, 117 N.M. 551, 874 P.2d 12 (1994) (though defendant not under arrest, his shoes properly seized without warrant when by plain view officer saw shoes "appeared to have the same tracks as the footprints found at the crime scene").

183. United States v. Williams, 822 F.2d 1174 (D.C.Cir.1987) (officer who lawfully felt bag for own protection incident to *Terry* stop on suspicion of drug transaction could open bag without warrant where, as here, "a lawful touching convinces the officer to a reasonable certainty that the container holds contraband or evidence of a crime"); United States v. Portillo, 633 F.2d 1313 (9th Cir.1980) (officer checking faulty tail light looked in trunk and supported his weight by putting hand on top of paper bag and felt a gun; because "the contents of the paper bag were apparent from the outward feel of the container," under "the reasoning of *Sanders* * * * appellants did not possess a reasonable expectation of privacy in the paper bag").

See Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), discussed in § 2.2(a), a "plain touch" case not actually involving this issue in which the Court nonetheless appeared to extend its discussion to this issue without recognizing that the touch must do *more* than establish probable cause.

184. United States v. Norman, 701 F.2d 295 (4th Cir.1983) (warrantless search of bales on ship lawful under plain view doctrine, as strong smell of marijuana, and the "contraband need only reveal itself in a characteristic way to one of the senses"); United States v. Lueck, 678 F.2d 895 (11th Cir.1982) (warrantless search of packages in truck lawful under plain view rule where they "reeked of marijuana"); United States v. Haley, 669 F.2d 201 (4th Cir.1982) (stressing "intense marijuana odor" in upholding warrantless search of garbage bags); State v. Kahlon, 172 N.J.Super. 331, 411 A.2d 1178 (1980) (lawful to search without warrant cardboard box in car, as the flaps when closed left a 6–inch square opening on top, and it "was from this box that the odor of marijuana emanated"); State v. Nichol, 55 Or.App. 162, 637 P.2d 625 (1981) (warrantless search of paper bag in car lawful, as "the odor from the paper bag revealed its contents as fully as if it had been made of clear, not opaque, material").

185. State v. Gauldin, 44 N.C.App. 19, 259 S.E.2d 779 (1979) (because "the sense of smell, unlike eyesight, does not always pinpoint what is being sensed and where the material is located," there is reason to be rather demanding concerning the proof of exactly what was smelled and from where; it not sufficient that here the smell of marijuana was detected in the vehicle generally and not just around the suitcase found within).

186. But compare State v. Kahlon, note 184 supra, with United States v. Dien, 609 F.2d 1038 (2d Cir.1979), adhered to on rehearing, 615 F.2d 10 (2d Cir.1980) (notwithstanding odor of marijuana, warrantless search improper; defendant had expectation of privacy by "placing the marijuana inside a plain cardboard box [and] sealing it").

187. 469 U.S. 478, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985).

case fell within footnote 13 of *Sanders* because police discovered "packages reeking of marihuana" in the back of two pickup trucks. The two dissenters chastised the majority for suggesting "a very definite view with respect to the merits of this issue," which was not before the Court and had been "the subject of a significant divergence of opinion in the lower courts.")

Absent such a plain view, touch or smell, how else may the contents of packages be "inferred from their outward appearance"? One possibility is by plain view once removed, as where, to use the language of the *Robbins* plurality, "the distinctive configuration of a container proclaims its contents." The *Sanders* illustration of "a gun case" is such a situation, as is a bulging container where "the bulge was in the shape of * * * a pistol."[188] But the other illustration given by the *Sanders* Court, "a kit of burglar tools," though accepted by the *Robbins* plurality as among "the very model of exceptions which prove the rule," cannot be explained on the same basis. There is no "distinctive configuration" which, standing alone, identifies the contents of a container enclosing burglar tools. Thus there is an inherent ambiguity in the footnote 13 exception: was the burglar tools hypothetical merely an ill-considered example, or was it intended to suggest that there are still other situations in which no warrant is required?

The *Robbins* case illustrates the significance of this question. Each of the packages in that case "resembles an oversized, extra-long cigar box with slightly rounded corners and edges," "wrapped or boxed in an opaque material covered by an outer wrapping of transparent, cellophane-type plastic" and "sealed on the outside with at least one strip of opaque tape." The California court of appeals concluded that these packages fell within the footnote 13 exception of *Sanders,* since "any experienced observer could have inferred from the appearance of the packages that they contained bricks of marijuana."[189] But the *Robbins* plurality disagreed; noting that the searching officer testified he "had heard" that marijuana was so packaged but "had never seen" such a package before, they said:

> This vague testimony certainly did not establish that marijuana is ordinarily "packaged this way." Expectations of privacy are established by general social norms, and to fall within the second exception of the footnote in question a container must so clearly announce its contents, whether by its distinctive configuration, its

188. See also United States v. Huffhines, 967 F.2d 314 (9th Cir.1992) (no search warrant needed where gun was in the bag and officer "could tell what was in the bag by looking at it"); United States v. Miller, 929 F.2d 364 (8th Cir.1991) (proper to open bag without warrant where its size and shape indicated it contained a gun); State v. McGregor, 57 Or.App. 78, 643 P.2d 1315 (1982) (warrantless search proper where container a triangular pistol case, as "the pistol case, by its distinctive configuration, indicated its contents").

Compare United States v. Rigales, 630 F.2d 364 (5th Cir.1980) (reliance on "gun case" language rejected where container searched was "not a gun case" but only "an ordinary briefcase that was simply heavy and bulging").

189. People v. Robbins, 103 Cal.App.3d 34, 162 Cal.Rptr. 780 (1980).

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transparency, or otherwise, that its contents are obvious to an observer. If indeed a green plastic wrapping reliably indicates that a package could only contain marijuana, that fact was not shown by the evidence of record in this case.

This strongly suggests that those four Justices declined to accept Justice Rehnquist's conclusion that the officer "was aware that contraband was often wrapped in this fashion," because they believed this was not (as Rehnquist put it) "a fact of which all those who watch the evening news are surely aware," but rather a fact which could be established only by a stronger record concerning the officer's relevant experience and expertise.[190] The "or otherwise" in the *Robbins* plurality opinion thus seems to mean *at least* this: even if the contents of the container are not seen, felt or smelled or revealed by the shape of the container or bulges therein, the container *still* does not deserve the full protections of the Fourth Amendment if the character of the container alone suffices to "clearly announce" its contents. (That is, if a brick-shaped object with rounded edges in a plastic container clearly announces that it contains marijuana[191] and if a small glassine or tinfoil package or a tied-up balloon clearly announces that it contains illegal drugs,[192] then these containers may be searched without a warrant.) So stated, the rule appears to require (i) a high degree of certainty about the contents of the container, (ii) ascertained from the nature of the container itself.

As to the first of these possible requirements—that the container may be said to "clearly announce" its contents (or, as the *Robbins* plurality put it at another point, that "the container * * * clearly revealed its contents")—it must be asked whether it calls for a higher degree of probability than is necessary under the probable cause test[193] and, if so, how certain it must be what the contents are. This question

190. On the importance of this in the probable cause determination, see § 3.2(c). Of course, in this context the question is not simply whether there is probable cause, but rather whether there is (as the *Sanders* footnote 13 puts it) "any reasonable expectation of privacy" in the container. This being so, it might be contended that the cases on police expertise in establishing probable cause are not relevant here. Such was the conclusion reached in People v. Smith, 103 Ill.App.3d 430, 59 Ill.Dec. 198, 431 N.E.2d 699 (1982), judgment rev'd on other gnds., 95 Ill.2d 412, 69 Ill.Dec. 374, 447 N.E.2d 809 (1983), holding that "the container must be evaluated to determine whether society as a whole would recognize it as one commonly used to carry a controlled substance."

191. Cf. United States v. Robles, 37 F.3d 1260 (7th Cir.1994) (remand necessary for determination if characteristics of observed containers obviated need for warrant; court distinguishes observation of a black plastic bag "similar to the bag used in the earlier delivery of cocaine," which "alone is not enough" because such "bags are commonly found in many households," from observation of "packages which are distinctively wrapped tightly in plastic and sealed with duct tape," which "could render the container's incriminating characteristics immediately apparent").

192. See United States v. Gibson, 636 F.2d 761 (D.C.Cir.1980) (where officer using binoculars at third-floor window saw defendant put glassine envelopes into purse in car, this "brings the case within the Court's 'plain view' holding").

Compare State v. James, 795 So.2d 1146 (La.2000) ("film canisters are not so peculiarly associated with drug trafficking that the plain feel or view of their outer surfaces is the functional equivalent of the plain view or fell of their contents," and thus warrantless opening of cannister and examination of contents an illegal search).

193. See § 3.2(e).

logically leads to *Texas v. Brown*,[194] where after a car was stopped at a routine driver's license checkpoint an officer saw the driver drop a knotted opaque party balloon onto the seat and then observed several small plastic vials, quantities of loose white powder and an open bag of party balloons in the glove compartment. The officer then seized the balloon and arrested the defendant, and a police chemist later determined that the substance in the balloon was heroin. The defendant challenged the warrantless seizure of the balloon, and the court below decided in his favor, ruling that the state could not avail itself of the "plain view" doctrine because the officer did not know that incriminating evidence was before him.[195] The four-Justice[196] plurality opinion, addressing this "plain view" theory, concluded that it required not the "near certainty" assumed by the court below but only probable cause and then determined "that Officer Maples possessed probable cause to believe that the balloon in Brown's hand contained an illicit substance."

At first blush, it might seem that the *Brown* decision has translated footnote 13 of *Sanders* into this proposition: if there is probable cause a container has evidence of crime within it, then no warrant is needed to seize that container and then search it. But such an interpretation of the *Brown* plurality opinion, which would mean that the footnote 13 exception would have completely swallowed the warrant requirement for containers, would be in error. For one thing, at no point does the plurality refer to *Sanders* or in any way suggest that it is interpreting the footnote 13 exception. For another, and more importantly, the *Brown* plurality was not even addressing the issue here under discussion, i.e., when a warrant is not needed to *search* a container found in a car. The defendant inexplicably raised only the question of the warrantless seizure of the balloon, and only that issue was addressed by the Supreme Court.[197] As three concurring members of the Court[198] quite correctly pointed out, that is a relatively easy issue and one which, under the Court's prior decisions, can best be resolved without becoming entangled in the troublesome concept of "plain view." The seizure of the container requires only probable cause, but under the since-overruled *Sanders* doctrine it did not follow from this that a warrantless search of the container would also be permissible.[199] Rather, absent probable cause

194. 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983) discussed in Note, 67 Marq.L.Rev. 366 (1984).

195. The court below understandably did not assess the actions of the police as a search incident to arrest under the *Belton* rule or as a part of a search of a vehicle under the *Ross* rule, for neither of those cases had yet been decided.

196. Rehnquist, J., joined by the Chief Justice, and White and O'Connor, JJ.

197. See United States v. Miller, 769 F.2d 554 (9th Cir.1985), so interpreting *Brown*.

198. Stevens, J., joined by Brennan and Marshall, JJ. The other two Justices, in a separate concurring opinion, seem to share their concerns, for they stated that the plurality opinion "appears to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and purpose of that Amendment."

199. They correctly noted after citing *Ross*, *Chadwick* and *Sanders*: "All of these cases * * * demonstrate that the constitutionality of a container search is not automatically determined by the constitutionality of the prior seizure."

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to search the entire car,[200] a warrant was then necessary unless the case could be brought within footnote 13 of *Sanders*. What is required, said these three Justices in *Brown,* is "a degree of certainty that is equivalent to the plain view of the heroin itself," that is, a "virtual certainty that the balloon contained a controlled substance."[201] Whether this "virtual certainty" test will evolve as the standard under footnote 13 of *Sanders* remains to be seen;[202] shortly after *Brown* the Court in a somewhat analogous situation utilized a less demanding (and, it would seem, more ambiguous) test.[203]

Under either a "virtual certainty" or similar test, there remains the other question alluded to earlier—whether, as it is put in footnote 13 of *Sanders,* that determination must be based exclusively on the "very nature" of the container? If it does, doubtless this will be the cause of considerable difficulty, for it is rather awkward, to say the least, to separate out the nature of the container from the circumstances of its possession or transportation in making any kind of judgment about what it contains. *Robbins* provides an excellent illustration of this point. If one were to ask whether there was a "virtual certainty" that the two packages contained marijuana, certainly one would consider not only the shape and size and wrapping of the packages, but also (as Justice Rehnquist emphasized) that they were found in the luggage compartment after the officers "had already discovered marijuana in the passenger compartment of the car" and the defendant then "stated: 'What you are looking for is in the back.' " Likewise, in *Brown* one would consider not only the knotted balloon but also the fact that it had been seen

200. Actually, in *Brown* it would appear there was probable cause to search the entire car, so that under *Ross* (not yet decided when the Texas court ruled in the instant case) that would be the easiest basis upon which to uphold the search of the container here. As the three concurring Justices noted, "it is entirely possible that what the officer saw in the car's glove compartment, coupled with his observation of respondent and the contents of his pockets, provided probable cause to believe that contraband was located somewhere in the car—and not merely in the one balloon at issue."

201. As they observed: "Sometimes there can be greater certainty about the identity of a substance within a container than about the identity of a substance that is actually visible. One might actually see a white powder without realizing that it is heroin, but be virtually certain a balloon contains such a substance in a particular context. It seems to me that in evaluating whether a person's privacy interests are infringed, 'virtual certainty' is a more meaningful indicator than visibility."

202. United States v. Williams, 822 F.2d 1174 (D.C.Cir.1987), uses the phrase "reasonable certainty," but stresses: "In the present type of situation the information in 'plain view' must be good enough to eliminate all need for additional search activity. This can only occur when sensory information acquired by the officer rises to a state of certitude, rather than mere prediction, in regard to the object of the investigation. This level of conviction must be objectively reasonable in light of the officer's past experience and training, and capable of verification by a reviewing court."

203. Illinois v. Andreas, 463 U.S. 765, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983). In that case, the question was whether a container, previously lawfully opened and then the subject of a controlled delivery, could be reopened without a warrant when there had been a short break in the police surveillance. See § 5.5(e). The majority answered in the affirmative, holding "that absent a substantial likelihood that the contents have been changed, there is no legitimate expectation of privacy in the contents of a container previously opened under lawful authority." One of the three dissenters, Stevens, J., asserted: "The issue in this case is remarkably similar to the controlling issue in Texas v. Brown * * *: Was there 'virtual certainty' that the police would find contraband inside an unusual container that they had lawfully seized?"

within a car in which there was also observed several small plastic vials and quantities of loose white powder.[204] In these and similar situations,[205] it seems unrealistic to expect that the "virtual certainty" or similar determination should be made in total disregard of the circumstances in which the container was seen.[206]

Of course, if this reasoning is pursued far enough, then the resulting rule is this: upon a "virtual certainty" that seizable objects are inside a container, it may be searched without a warrant without regard to the nature or source of the information upon which that determination was made. In other words, even if the container itself is innocuous and unrevealing but based on other information (e.g., from an informant with extraordinary credentials) there is an exceptionally strong showing of probable cause, then no warrant is needed. It is to be doubted, however, whether footnote 13 of *Sanders* will evolve into such a rule.[207] For one thing, such an open-ended variety of the search warrant exception, not limited to the first-hand perception of the police regarding the nature of the container and the circumstances of its use, would increase significantly the risk of erroneous police decisions on whether there is sufficient certainty to permit a warrantless search. For another, such an extension of the *Sanders* footnote 13 concept would outrun its rationale, namely, that a person cannot claim any reasonable expectation of privacy

204. Those additional facts are stressed by the plurality in *Brown*, though for them the question was only one of probable cause.

205. Another situation would be when a container of a certain special type is found with other containers of exactly the same type which are open, revealing their contents. See, e.g., Blair v. United States, 665 F.2d 500 (4th Cir.1981), noting that footnote 13 of *Sanders* covers both open containers and distinctive configuration containers, and concluding the instant case involves "a combination of those two reasons," so that a warrantless search may be made of closed bales with "the virtually identical appearance" of other bales found there within which marijuana is visible.

Blair was relied upon in United States v. Williams, 41 F.3d 192 (4th Cir.1994), which takes matters one step further. In holding that when a suitcase checked with an airline was lawfully opened, revealing five cellophane-wrapped packages with a brown substance within and weighing approximately one kilogram each, and the detective testified that in his experience such packages "always" contain narcotics, no warrant was needed to open those packages. The court stressed the surrounding circumstances, here that the other contents of the suitcase seemed intended to hold the five packages in place and included "no items which a person typically carries in his or her suitcase when traveling."

206. The three concurring Justices in *Brown* do not address this point in specific terms, but intimate agreement with it when they state "a balloon of this kind might be used only to transport drugs. Viewing it where he did could have given the officer a degree of certainty that is equivalent to the plain view of the heroin." See also their language in note 201 supra.

But see the *Miller* case, note 208 infra; and United States v. Donnes, 947 F.2d 1430 (10th Cir.1991) (rejecting government's argument "that the narcotics found inside the camera lens case were in plain view because the camera lens case was inside a glove with a syringe," as "the officer's experience and training could have led him to infer that the camera lens case contained narcotics in light of the fact that it was found inside the glove with a syringe").

207. Cf. Matter of Welfare of G.M., 560 N.W.2d 687 (Minn.1997) (though no mention of *Sanders* fn. 13, court considers and rejects position of lower courts that because a certain pouch was in plain view and the police had probable cause it contained contraband, a warrantless opening of the pouch could be upheld under the plain view doctrine, for even if "the police had probable cause to believe that the pouch *contained* contraband, that belief came from an informant's tip and subsequent evasive answers from G.M.").

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in a container when its "outward appearance" in the circumstances in which he uses it makes it close to certain what it contains. Certainly revealing the contents to a confidant, even one who happens to be especially credible, is another matter.[208]

What then of incriminating admissions by the defendant? Assume a variation of the *Robbins* facts, namely, that instead of merely saying "What you are looking for is in the back," the defendant had said there was marijuana in the luggage compartment but the only container found therein (such as the tote bag also found in *Robbins*) itself indicated nothing about its contents. Is this a case in which a warrantless search is permissible? Justice Rehnquist would say yes, for he contends the defendant in *Robbins* "could have no reasonable expectation of privacy in the contents of the garbage bags" in light of his admissions to the police. In other words, the act of stating to police the contents of the container is much like revealing the contents by using a transparent container;[209] in neither instance, to use the footnote 13 language, does the container "deserve the full protection of the Fourth Amendment." Authority in support of this conclusion is to be found,[210] and it certainly

208. Cf. United States v. Miller, 769 F.2d 554 (9th Cir.1985) (court concluded fn. 13 of *Sanders* did not permit a warrantless search of a clear plastic bag found inside yet another plastic bag which fell from a suitcase that came open while being moved by baggage handlers; search occurred after field test of white powder in outside bag was negative, and court reasoned it not enough that container was "discovered under circumstances supporting a strong showing of probable cause" where, as here, that showing not based simply upon outward appearance of container but instead depended also upon "the circumstances under which the bag was discovered, the way in which it was wrapped, and because of Agent Markonni's considerable experience and expertise in drug enforcement"; extending fn. 13 exception to instant case, court reasoned (quoting the above analysis), "would increase significantly the risk of erroneous police decisions on whether there is sufficient certainty to permit a warrantless search," and would conflict with the rationale which "focuses on the individual's reasonable expectation of privacy"); Matter of Welfare of G.M., 560 N.W.2d 687 (Minn. 1997) (plain view doctrine not applicable to pouch containing contraband, as the probable cause as to such contents "came from an informant's tip and subsequent evasive answers from G.M." and not "upon what the officers saw in plain view").

209. This analogy is most compelling when the statement is as to the entire contents of the container. If a person tells the police he has a stolen diamond ring in his suitcase, it might be argued that this is not a surrender of his privacy expectation regarding the contents of the case generally.

210. United States v. Cardona–Rivera, 904 F.2d 1149 (7th Cir.1990) (when arrested defendant, asked what packages in his briefcase contained, said "coke," he "stripped the cloak of secrecy from the package. It was as if he had unwrapped it and pointed," and thus warrantless search of package proper); People v. Carper, 876 P.2d 582 (Colo.1994) (where the defendant a civil detainee, so that under state law closed containers on person could not otherwise be opened incident to arrest, defendant's admission that packet taken from his pocket contained cocaine meant he "did not manifest a subjective privacy interest in the contents of his pockets or of the bindle," so opening it no search); State v. Ludtke, 306 N.W.2d 111 (Minn.1981) (when passenger in car said satchel contained hashish and unregistered guns, search without warrant proper, as "here the officer did not have to infer—he knew—what the contents of the satchel were. More importantly, he knew that defendant, by volunteering what the contents were, had implicitly signaled that he no longer had any expectation of privacy in the satchel").

Compare People v. Rinaldo, 80 Ill.App.3d 433, 35 Ill.Dec. 738, 399 N.E.2d 1027 (1980) (a box in defendant's car could not be searched without a warrant merely because it was certainly the same box which police helped another person load into his car and which that person said contained a stolen microwave oven he was selling to defendant, as the police "had no first-hand

may be argued with some force that a warrantless search in such circumstances makes at least as much sense as in some of the other situations already discussed. An unequivocal incriminating admission regarding the contents of the container[211] leaves virtually no doubt as to what those contents are; by contrast, whether the officer's expertise and experience permit the conclusion that certain types of containers are very likely used only to hold illegal drugs might be thought to be precisely the kind of question as to which the judgment of a "neutral and detached" magistrate would be beneficial.

But the situation is different when the defendant has made nonincriminating admissions about the contents, at least if the government wants to search the container to see if instead or in addition it contains contraband. Illustrative is *United States v. Villarreal,*[212] where the government, relying on footnote 13 of *Sanders,* claimed the addressees of drums sent by common carrier had no justified expectation of privacy in those containers because the shipping order and the drums themselves indicated they contained phosphoric acid. The court disagreed:

> The fact that the exterior of a container purports to reveal some information about its contents does not necessarily mean that its owner has no reasonable expectation that those contents will remain free from inspection by others. Stated another way, a label on a container is not an invitation to search it. If the government seeks to learn more than the label reveals by opening the container, it generally must obtain a search warrant.[213] * * * It goes without saying that a defendant can orally inform a police officer what is in a container, yet stand on his rights and refuse to allow the officer to search that container. The same result should obtain when the information is written on the container rather than orally revealed.

The court emphasized it was *not* deciding "whether an individual could have a reasonable expectation of privacy in a container when he has plainly communicated its *incriminating* character to the public—if, for example, the drums in this case were labeled as marijuana."

Library References

C.J.S. Arrest § 65; C.J.S. Searches and Seizures §§ 14, 18, 20–24, 31–32, 39–40, 43, 50, 57–63, 66–67, 69, 71–72, 77–78, 102.

West's Key No. Digests, Arrest ⇐71.1(5); Controlled Substances ⇐107; Postal Service ⇐47; Searches and Seizures ⇐29, 34, 42, 50, 58, 65.

knowledge of its contents"). *Rinaldo* is distinguishable from *Ludtke,* for there was no surrender of a privacy expectation by the defendant himself; it is more like the informer hypothetical discussed in the preceding paragraph.

211. As compared with, for example, merely evasive answers to police questions; cf. the *G.M.* case, note 208 supra.

212. 963 F.2d 770 (5th Cir.1992).

213. Citing Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980) (defendants did not lose all expectation of privacy in pornographic films when their description labels were exposed to plain view).

ENTRY ANI

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(Fla.1972) (neither "common law" nor rules "the physical examination of a witness"); la.App.1993) (no common law or court rule pp. 274, 495 S.E.2d 886 (1998) (there "no examination of victim); State v. McKinney, (state "has no rule or statute authorizing

a.App. 96, 521 S.E.2d 313 (1999).
1040 (Fla.App.1993).
37 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930

)raheim, 447 Mass. 113, 849 N.E.2d 823 folk U.L.Rev. 305 (2007); State v. Register,

) F.Supp.2d 129 (D.Me.2006), the prosecu- o teenagers who are not suspected of any their mouths and provide an exemplar of lstering their credibility as witnesses" by iat found at a scene they claimed to be at en in a recent nearby arson. In refusing to vas willing to assume that there was prob- nd prints were on the items found at that not the kind of probable cause needed to ig their persons: (i) there were not grounds the "government has shown no probable o believe that either * * * was engaged in ounds for search, as "probable cause for a e 'particularized with respect to' the indi- of there being "probable cause to believe olated the law"; and (iii) in any event, the not 'evidence of a crime,' but rather evi- ence that is evidence of a crime."

characterizations of the probable cause ii), the notion that evidence serving to cor- nt is not seizable evidence is inexplicable what is evidence when a defendant has) So.2d 249 (Ala.Crim.App.1996) (warrant aphing of defendant's genitalia lawfully is- a crime, even though evidence was not existence of substances in his system, but given by minor victim, who told investiga- ole on underside of defendant's scrotum). ied proposition, see § 3.1(b), that probable the probability of finding evidence at the ed to show probable cause as to the person while it is unquestionably true that prob- mitting a crime requires probable cause it hardly follows that all constitutional rators rather than possible witnesses, cf. S.Ct. 885, 157 L.Ed.2d 843 (2004), and in ion is only to facilitate the search, surely the search should likewise suffice for the

26 N.E.2d 186 (2005).

rate investigator who obtained samples of then "positively identified" that DNA as s the secondary DNA source" on an instru-

ment used in the rape, but now needed another DNA sample from Jansen to "avoid any chain of custody problems" involved in the earlier matching.

[84]Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), discussed in § 1.8(g).

[85]People v. Browning, 108 Cal.App.3d 117, 166 Cal.Rptr. 293 (1980); Bartlett v. Hamwi, 626 So.2d 1040 (Fla.App.1993); Weems v. State, 268 Ga. 142, 485 S.E.2d 767 (1997); State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978); Park v. State, 230 Ga.App. 274, 495 S.E.2d 886 (1998). See also Comment, 57 U.Chi.L. Rev. 873, 894-900 (1990).

[86]People v. Browning, 108 Cal.App.3d 117, 166 Cal.Rptr. 293 (1980). Accord: Bartlett v. Hamwi, 626 So.2d 1040 (Fla.App.1993) ("Certainly a witness who is not a suspect, defendant or victim, should have no less protection against bodily intrusion than defendants or suspects in criminal cases").

[87]If the defendant merely wanted to obtain the third party's fingerprints, it may be that only a reasonable suspicion would be necessary. See § 9.8(b).

[88]People v. Browning, 108 Cal.App.3d 117, 166 Cal.Rptr. 293 (1980), quoting People v. Scott, 21 Cal.3d 284, 145 Cal.Rptr. 876, 578 P.2d 123 (1978). See note 81 supra regarding the error of putting the probable cause test differently.

[89]Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

[90]Winston v. Lee, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985).

[91]See § 4.1(e).

[92]People v. Browning, 108 Cal.App.3d 117, 166 Cal.Rptr. 293 (1980).

[93]State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978).

[94]Followed in Weems v. State, 268 Ga. 142, 485 S.E.2d 767 (1997); Park v. State, 230 Ga.App. 274, 495 S.E.2d 886 (1998).

However, a concurring opinion in *Haynie* says the majority "makes some very bad and some very unwarranted Fourth Amendment law" by misreading State v. Smith, 260 So.2d 489 (Fla.1972), which in fact is not based on the Fourth Amendment, as justifying the conclusion that "such a search violates the Fourth Amendment and thus may not ever be authorized."

[95]State v. Ramos, 553 A.2d 1059 (R.I.1989). Accord: Turner v. Commonwealth, 767 S.W.2d 557 (Ky.1988); Clark v. Commonwealth, 31 Va.App. 96, 521 S.E.2d 313 (1999); State v. Delaney, 187 W.Va. 212, 417 S.E.2d 903 (1992).

[96]Consider in this regard Comment, 57 U.Chi.L.Rev. 873, 879 (1990), noting that the Supreme Court's "decisions reveal that due process does not entitle defendants to obtain compulsory physical examination of their alleged victims."

[97]Bartlett v. Hamwi, 626 So.2d 1040 (Fla.App.1993). The "rare instance" notion is also found in other cases, e.g., State v. Smith, 260 So.2d 489 (Fla. 1972); State v. McKinney, 273 Neb. 346, 730 N.W.2d 74 (2007).

§ 5.5 Seizure and search of containers and other personal effects

n. 9.

And as to the bicycle defendant was riding when arrested, see United States v. Currence, 446 F.3d 554 (4th Cir.2006) (search of bicycle handlebar valid search incident to arrest here, as defendant "was in close proximity to the bicycle" and thus it within his "immediate control," given his "ability to reach into the easily accessible handlebar").

n. 10.

Compare State v. LaMay, 140 Idaho 835, 103 P.3d 448 (2004).

n. 16.

(Delete Sloan case)

n. 26.

United States v. Maddox, 614 F.3d 1046 (9th Cir.2010) (while defendant ar-

rested within his vehicle police officer threw his key chain onto the seat and, after defendant handcuffed within police car, small container attached to chain searched; that search unlawful, as there "no possibility of Maddox concealing or destroying the key chain and the items contained therein"; no mention of *Belton*, text infra, or its limitation by *Gant*, text infra).

n. 28.

United States v. Sloan, 293 F.3d 1066 (8th Cir.2002) (purse in defendant's possession at time of arrest).

n. 33.

Compare with State v. LaMay, 140 Idaho 835, 103 P.3d 448 (2004) (*Belton* not applicable outside vehicle context, and thus where defendant arrested in motel room and then handcuffed and required to be seated in hallway, there then not a basis to search incident to arrest of backpack which had been about 10 feet from defendant's fingers when police entered).

n. 36.

Morales was followed even after *Belton* was limited by *Gant*; see United States v. Perdoma, 621 F.3d 745 (8th Cir.2010), discussed in note 39.2 infra.

(Add new footnote 38.1 between "desirable" and "and," in text following footnote number 38)

[38.1]See Lee, Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment, 100 J.Crim.L. & Criminology 1403 (2010), critically assessing how lower courts have avoided *Chadwick*'s "container doctrine."

(Add new text at end of paragraph after "context," as a new paragraph, in text following footnote number 39)

However, the preceding assessment must be reevaluated in light of a very important post-*Belton* development, a reinterpretation of that case in *Arizona v. Gant*.[39.1] The Court in *Gant* appeared to retain much of the "bright line" character of the search rule as set forth in *Belton*, but yet construed that case as actually standing for the proposition that vehicle searches incident to arrest are permissible in only two situations: (i) where there is a "possibility of access"; and (ii) where there is reason to believe evidence of the crime of arrest might be found within. The latter situation, *Gant* says, is grounded in "circumstances unique to the vehicle context," and thus would appear to have no application whatsoever in the container situation here under discussion. But, items (4) and (5) on the preceding list are affected, at least to some degree, by the first *Gant* situation. The Court says that this "possibility of access" must be judged as of "the time of the search," rather than at some earlier point, and that such access is deemed possible *only* "when the arrestee is unsecured and within reaching distance." Precisely the same judgment, it would seem, must now be made in any case where search of a container is purported to be incident to arrest of the person who had possessed it.[39.2] Also, as argued elsewhere herein,[39.3] *Gant* should be construed as requiring police to take available steps to ensure against such a "possibility of access" (which the Court says should exist *only* in a "rare case") which if applied in the instant context

would virtually eliminate a basis f
to arrest.

[39.1]Arizona v. Gant, — U.S. —, 129 S.

[39.2]See the *Maddox* case, note 26 supr

Consider also United States v. Pe
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may prove to be instructive outside the
* * * this is not such a case," as defenda
how the circumstances of his arrest in
'secured' and out of reaching distance of
circumstances in *Gant*," and, "the recor
close proximity to his bag while it was se
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was restrained and a police officer had ta

[39.3]See § 7.1(c).

n. 40.

United States v. Farley, 607 F.3d
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[43.1]United States v. Burnette, 375 F.3

n. 56.

United States v. Farley, 607 F.3d 12
State, 280 Ga. 70, 623 S.E.2d 504 (2005)

n. 57.

United States v. Tackett, 486 F.3d 2
hicle ran off road and defendant crawle
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of consciousness, per *Markland* police in
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177 (Fla.2010) (where police summone
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n. 69.

See, e.g., United States v. Banks, 4
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explainable by fact officer retrieved her
and brought them to station, but the of
routine practice").

n. 71.

Accord: United States v. Tackett, 48

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In some circumstances, wher
certain location and then subs
obtained authorizing the search

ficer threw his key chain onto the seat and, af- police car, small container attached to chain s there "no possibility of Maddox concealing or items contained therein"; no mention of *Belton*, *nt*, text infra).

F.3d 1066 (8th Cir.2002) (purse in defendant's

y, 140 Idaho 835, 103 P.3d 448 (2004) (*Belton* ntext, and thus where defendant arrested in l, and required to be seated in hallway, there nt to arrest of backpack which had been about vhen police entered).

after *Belton* was limited by *Gant*; see United (8th Cir.2010), discussed in note 39.2 infra.

between "desirable" and "and," in text 38)

ootlockers, and Laptops: What the Disappear- ell Us About the Fourth Amendment," 100)10), critically assessing how lower courts have ctrine."

paragraph after "context," as a new footnote number 39)

assessment must be reevaluated in st-*Belton* development, a reinterpreta- *Gant*.[39.1] The Court in *Gant* ap- e "bright line" character of the search ut yet construed that case as actually that vehicle searches incident to ar- two situations: (i) where there is a ii) where there is reason to believe ev- st might be found within. The latter unded in "circumstances unique to the would appear to have no application situation here under discussion. But, receding list are affected, at least to *nt* situation. The Court says that this st be judged as of "the time of the ne earlier point, and that such access when the arrestee is unsecured and Precisely the same judgment, it would any case where search of a container to arrest of the person who had pos- elsewhere herein,[39.3] *Gant* should be ice to take available steps to ensure f access" (which the Court says should which if applied in the instant context

would virtually eliminate a basis for search of containers incident to arrest.

[39.1] Arizona v. Gant, __ U.S. __, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

[39.2] See the *Maddox* case, note 26 supra.

Consider also United States v. Perdoma, 621 F.3d 745 (8th Cir 2010): "While the explanation in *Gant* of the rationale for searches incident to arrest may prove to be instructive outside the vehicle search context in some cases, * * * this is not such a case," as defendant "has not meaningfully argued * * * how the circumstances of his arrest in a public bus terminal rendered him 'secured' and out of reaching distance of his bag in a manner analogous to the circumstances in *Gant*," and "the record suggests that Perdoma was held in close proximity to his bag while it was searched." The court rejected defendant's argument "that during the search, the bag was 'beyond his reach' because he was restrained and a police officer had taken control of the bag."

[39.3] See § 7.1(c).

n. 40.

United States v. Farley, 607 F.3d 1294 (11th Cir.2010) (inventory of defendant's briefcase, seized when defendant was earlier seized and taken off commercial airliner, lawful).

(Add new text between "arrest" and "As," and change period to comma, in text following footnote number 43)

but could do so at defendant's request.[43.1]

[43.1] United States v. Burnette, 375 F.3d 10 (1st Cir.2004).

n. 56.

United States v. Farley, 607 F.3d 1294 (11th Cir.2010) (briefcase); Marks v. State, 280 Ga. 70, 623 S.E.2d 504 (2005) (briefcase).

n. 57.

United States v. Tackett, 486 F.3d 230 (6th Cir.2007) (when defendant's vehicle ran off road and defendant crawled up hill carrying backpack and computer bag, and police and ambulance to scene and defendant slipped in and out of consciousness, per *Markland* police inventory of backpack lawful incident to "police officer's duty to protect citizens' property"); Twilegar v. State, 42 So.3d 177 (Fla.2010) (where police summoned to campground found a particular campsite had apparently been burglarized and vandalized, with various items strewn about, and police removed items for safekeeping in event burglar returned, and when items unclaimed 2 days later inventoried the property seeking a lead to identity of owner, such actions proper).

n. 69.

See, e.g., United States v. Banks, 482 F.3d 733 (4th Cir.2007) (some deviation from written inventory policy, covering possessions carried by arrestees, explainable by fact officer retrieved her bags from car at defendant's request and brought them to station, but the officer's "search of the bag mirrored this routine practice").

n. 71.

Accord: United States v. Tackett, 486 F.3d 230 (6th Cir.2007).

(Add new text at end of paragraph after "situation, as a new paragraph, in text following footnote number 108)

In some circumstances, where a container is seized from a certain location and then subsequently a search warrant is obtained authorizing the search of the container, the question

may be whether there were circumstances justifying the initial warrantless seizure. Illustrative is *Commonwealth v. Kaupp*,[108.1] where high school authorities summoned police after they discovered, in the school's electronic shop, several unauthorized computers connected to the high school's network; using a school employee's computer and a school-owned server, the officials accessed the open share of two computers and found child porn and apparently pirated movies on one, and only the movies on the other (the defendant's). Police then seized the defendant's computer without a warrant, but refrained from examining the contents until a search warrant issued. In response to defendant's challenge of the warrantless seizure of his computer, the court responded that "impoundment of an object pending the issuance of a search warrants violates the Fourth Amendment * * * only if it is unreasonable," which was *not* the case here "[g]iven the ease with which computer files may be accessed and deleted, and the disruption that would have been created by posting an officer in the defendant's office and preventing students from entering pending the issuance of a search warrant."[108.2] (The court added, with no discussion on this point, that the warrantless seizure did not become unreasonable because of the nine-day delay in obtaining the warrant.[108.3])

[108.1]Commonwealth v. Kaupp, 453 Mass. 102, 899 N.E.2d 809 (2009). See also State v. Drewry, 946 A.2d 981 (Me.2008) (where defendant arrested at transients' shelter, seizure of defendant's bags because "exigent circumstances existed, namely, the location of Drewry's bags in a large, unlocked office at the transient shelter used primarily by several staff members but that could have been accessible at any moment by a number of people, staff and non-staff alike"; subsequent search pursuant to search warrant).

[108.2]The court emphasized that the exigency "dissipated once the computer had been seized, requiring the police to seek a search warrant to conduct a forensic analysis" of defendant's computer.

[108.3]Perhaps the court thought this was beyond dispute in light of another case cited, People v. Shinohara, 375 Ill.App.3d 85, 313 Ill.Dec. 515, 872 N.E.2d 498 (2007), holding a two and a half month delay not unreasonable.

(Add new text between "believed" and "to," in text following footnote number 109)

to contain a weapon that could endanger police or bystanders[109.1] or

[109.1]United States v. Adams, 583 F.3d 457 (6th Cir.2009) (where police in motel room conducting consent search lawfully picked up jacket from floor and found it to be quite heavy, so there "probable cause to believe that there was a gun inside the jacket," defendant's claim *Chadwick* requires search warrant rejected on these facts, as "officer safety satisfied the exigent circumstances exception").

(Add new text at end of paragraph after "seriously," as a new paragraph, in text following footnote number 118)

A similar assessment would appear to be appropriate with re-

spect to another variety of persona
concluded "that the Fourth Amend
warrant for the collection of
communications,"[118.1] unlike the si
vehicles:

> Under the so-called "automobile exc
> to believe that evidence or contraba
> immediate search of the car without
> can be moved creates a sort of exige
> warrantless automobile search. Like
> can be moved: data can be zipped arou
> Does this mean that there should be
> Fourth Amendment modeled on the a
>
> The answer is "no." The reason is t
> very different sense than automobil
> move, they disappear: the officer whc
> warrant will find that the car is gone
> puter data moves in a different way.
> move as get copied. When a file is tra
> other, a new copy is generated and th
> place. The old copy is ordinarily left
> is made, that copy can be con
> interference.[118.2]

This being the case, it has been co
sion in the Stored Communication
ment to obtain the contents of some
with less process than a warrant,[11

[118.1]Kerr, Applying the Fourth Amen
Approach, 62 Stan.L.Rev. 1005, 1039 (201

[118.2]Kerr, 62 Stan.L.Rev. 1005, 1041 (
exigency that justifies a rule that the g
munications without a warrant. At most, t
ment either to make a copy of the data ar
or else to order a third party like an ISP
warrant." Id. at 1041–42.

[118.3]18 U.S.C.A. § 2703(b).

[118.4]Kerr, 62 Stan.L.Rev. 1005, 1043–4
"Internet providers ordinarily respond to
files by sending the government a cor
described in the subpoena," that "data r
tion: it is no different from a copy of elect
home computer. Thus the government r
copy of the contents, but it would need
contents for evidence."

n. 137.

Commonwealth v. Nattoo, 452 Mas
dant, evicted from mobile home where he
outside in several garbage bags, and the
warrant; police later were informed b
defendant's effects were by side of road, s
to station and inventoried them; officer's

circumstances justifying the initial
tive is *Commonwealth v. Kaupp*,[108.1]
ties summoned police after they
ectronic shop, several unauthorized
igh school's network; using a school
school-owned server, the officials ac-
computers and found child porn and
n one, and only the movies on the
ce then seized the defendant's com-
out refrained from examining the
nt issued. In response to defendant's
seizure of his computer, the court
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was *not* the case here "[g]iven the
es may be accessed and deleted, and
ve been created by posting an officer
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arch warrant."[108.2] (The court added,
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3 Mass. 102, 899 N.E.2d 809 (2009). See also
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number of people, staff and non-staff alike";
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5 Ill.App.3d 85, 313 Ill.Dec. 515, 872 N.E.2d
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safety satisfied the exigent circumstances

ıragraph after "seriously," as a new
ootnote number 118)
ld appear to be appropriate with re-

spect to another variety of personal effects, so that it may be concluded "that the Fourth Amendment ordinarily requires a warrant for the collection of the contents of Internet communications,"[118.1] unlike the situation that obtains as to vehicles:

> Under the so-called "automobile exception," * * * probable cause to believe that evidence or contraband is inside a car justifies an immediate search of the car without a warrant. The fact that a car can be moved creates a sort of exigent circumstance justifying a warrantless automobile search. Like automobiles, computer data can be moved: data can be zipped around the world in a split second. Does this mean that there should be an Internet exception to the Fourth Amendment modeled on the automobile exception?
>
> The answer is "no." The reason is that computer data moves in a very different sense than automobiles or ships move. When cars move, they disappear: the officer who leaves a car alone to go get a warrant will find that the car is gone by the time he returns. Computer data moves in a different way. First, the data don't so much move as get copied. When a file is transferred from one place to another, a new copy is generated and that new copy is sent to the new place. The old copy is ordinarily left behind. Further, when a copy is made, that copy can be controlled and protected from interference.[118.2]

This being the case, it has been cogently suggested that a provision in the Stored Communications Act, permitting the government to obtain the contents of some remotely stored Internet files with less process than a warrant,[118.3] is unconstitutional.[118.4]

[118.1] Kerr, Applying the Fourth Amendment to the Internet: A General Approach, 62 Stan.L.Rev. 1005, 1039 (2010).

[118.2] Kerr, 62 Stan.L.Rev. 1005, 1041 (2010). Indeed, "there is no general exigency that justifies a rule that the government can access Internet communications without a warrant. At most, the exigency should permit the government either to make a copy of the data and store it until a warrant is obtained or else to order a third party like an ISP to do so and hold the data pending a warrant." Id. at 1041–42.

[118.3] 18 U.S.C.A. § 2703(b).

[118.4] Kerr, 62 Stan.L.Rev. 1005, 1043–44 (2010), thus concluding that when "Internet providers ordinarily respond to a government subpoena for electronic files by sending the government a computer disk containing the contents described in the subpoena," that "data retains its Fourth Amendment protection: it is no different from a copy of electronic files copied from the target's own home computer. Thus the government may not need probable cause to get a copy of the contents, but it would need a warrant to access and search the contents for evidence."

n. 137.

Commonwealth v. Nattoo, 452 Mass. 826, 898 N.E.2d 827 (2009) (defendant, evicted from mobile home where he a trespasser, took his personal effects outside in several garbage bags, and thereafter was arrested on an outstanding warrant; police later were informed by mobile home owner that arrested defendant's effects were by side of road, so officer picked them up and took them to station and inventoried them; officer's inspection of contents before transport-

ing bags to station upheld as reasonable because it "served to ensure his personal safety").

n. 155.

See also United States v. Robinson, 390 F.3d 853 (6th Cir.2004) (where package earlier reached pursuant to warrant and found to contain 14 lbs. of marijuana, under *Andreas* no search warrant needed for second search of package after defendant picked it up at mailbox rental facility, as "the package remained within their constructive possession at all times until Robinson claimed it, and where he was arrested immediately thereafter as he exited the [facility] with the package").

n. 166.

So too, it has been held that *Andreas* does not apply to search of a container having within it the same contents as were discovered earlier in a *different* container. State v. Birchard, 2010 Vt. 57, 5 A.3d 879 (2010).

n. 182.

But see United States v. Jackson, 381 F.3d 984 (10th Cir.2004) (where police officer first searched baby powder container with consent and found "white powdery substance inside a baggy," court asserts later warrantless search proper because it a "foregone conclusion" the powder was narcotics, said to require police "knowledge *approaching* certainty," though evidence relied upon appears merely to meet probable cause test as to what the observed white powder was—which should suffice).

(Add new footnote 187.1 between "situation" and "as," in text following footnote number 187)

[187.1]This is not to suggest that any case the defendant was actually using as a gun case deserves this characterization. See United States v. Gust, 405 F.3d 797 (9th Cir.2005) (case here not within footnote 13 of *Sanders* because record does not show "that the case in dispute is one that is susceptible to ready identification by the general public as a gun case," as case is "virtually identical to some * * * guitar cases"); United States v. Bonitz, 826 F.2d 954 (10th Cir.1987) (hard plastic container does not qualify as gun case where it "could equally be suspected of carrying a violin").

n. 188.

United States v. Banks, 514 F.3d 769 (8th Cir.2008) (object a single-purpose container, as it a molded plastic case with a configuration commonly used by handgun manufacturers in packaging a firearm for the consumer, and markings on container included the word "arms"); United States v. Taylor, 497 F.3d 673 (D.C.Cir.2007) (where in lawful search for person to be arrested gun case found under bed, case could be opened, as "gun cases and similar containors support no reasonable expectation of privacy if their contents can be inferred from their outward appearance"); United States v. Meada, 408 F.3d 14 (1st Cir.2005) (where officer lawfully within premises saw a container "readily identifiable as a gun case," especially because "of the GUN GUARD label" on it, container falls within *Sanders* exception).

Rigales was distinguished in United States v. Epps, 613 F.3d 1093 (11th Cir.2010) (where police arrested carjacker believed to be connected with just-committed bank robbery, and he carried "a pillowcase with pink stains on it," and officer knew tellers often give robber dye packs, "the pillowcase's contents could be inferred from its outwardly visible stains and the circumstances under which the police obtained it" under *Sanders*).

n. 190.

Compare with *Smith* People v. Jones, 215 Ill.2d 261, 294 Ill.Dec. 129, 830 N.E.2d 541 (2005) (no justified expectation of privacy in defendant's "one-hitter" box "commonly used to carry cannabis," even if "a civilian" might at best have

"a mere suspicion," as to the officer "the certainty," "taking into account his trainir discovered such boxes on at least 24 prior stances, the box was used as drug parapl State v. Heckathorne, 347 Or. 474, 223 cylinder exhibited blue discoloration arou his training and experience meant contact pears to reject position of intermediate a "announce its contents" "to the world" w training and experience, but state suprem ual expertise and training provide the k clues into probable cause," which is a qui 99 P.3d 987 (Wyo.2004) (court first relies and experience" to show that he knew tha design on it was a "stash box" for drugs, a of box permissible under rule that when proaching certainty as to the contents expectation of privacy).

n. 202.

Regarding cases using the "virtual ce 215 Ill.2d 261, 294 Ill.Dec. 129, 830 N.E.2

n. 205.

Cf. United States v. Tejada, 524 F.3 showed undercover agent "a small blue t said sale would have to be completed with dant went there police made lawful entry incident to arrest found the bag inside "need not" decided whether to adopt *Wil* obtained in warrantless search of that b discovery rule because of "certainty" th have been obtained; see criticism of case

n. 208.

Cf. United States v. Gust, 405 F.3d infra, court concludes that "the nature "without regard for the context in which ing officer had special reasons to believ otherwise the "single-purpose container" requirement"). See Comment, 30 N.Ill authority and favoring position that "ext in applying the single-purpose container

n. 209.

This distinction is especially signifi would likely impose limits on the exten illustrated by State v. Rupnick, 280 Kan judge made a *Sanders*-type argument to the hard drive of a computer, seized wi in exigent circumstances, would be per sions to an agent of the state gaming a Casino he had downloaded to his pers "stuff I shouldn't have." The majority rej puter is not truly analogous to a simp cabinet, even a locked one. Rather, it home, capable of holding a univers computer's outward appearance, unlik some of the cases cited by the dissent content or character of the information hard drive. In the circumstances of this

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United States v. Epps, 613 F.3d 1093 (11th carjacker believed to be connected with just- carried "a pillowcase with pink stains on it," robber dye packs, "the pillowcase's contents ly visible stains and the circumstances under r *Sanders*).

v. Jones, 215 Ill.2d 261, 294 Ill.Dec. 129, 830 ectation of privacy in defendant's "one-hitter" iabis," even if "a civilian" might at best have

mere suspicion," as to the officer "the contents of the box were a virtual certainty," "taking into account his training and experience," including having discovered such boxes on at least 24 prior occasions, where in "each of these instances, the box was used as drug paraphernalia and for no other purpose"); State v. Heckathorne, 347 Or. 474, 223 P.3d 1034 (2009) (where metal gas cylinder exhibited blue discoloration around its valve, which officer knew from his training and experience meant contact with anhydrous ammonia, court appears to reject position of intermediate appellate court that container did not announce its contents "to the world" where it necessary to rely on officer's training and experience, but state supreme court then says only that "individual expertise and training provide the knowledge that turns various sensory clues into probable cause," which is a quite different matter); Vassar v. State, 92 P.3d 987 (Wyo.2004) (court first relies upon trooper's "knowledge, training, and experience" to show that he knew that a wooden box with a marijuana leaf design on it was a "stash box" for drugs, and then concludes warrantless search of box permissible under rule that when "police already possess knowledge approaching certainty as to the contents of the container," defendant without expectation of privacy).

n. 202.

Regarding cases using the "virtual certainty" test, see, e.g., People v. Jones, 215 Ill.2d 261, 294 Ill.Dec. 129, 830 N.E.2d 541 (2005).

n. 205.

Cf. United States v. Tejada, 524 F.3d 809 (7th Cir.2008) (where defendant showed undercover agent "a small blue travel bag containing the cocaine" and said sale would have to be completed within nearby apartment, and after defendant went there police made lawful entry and arrested him and in lawful search incident to arrest found the bag inside entertainment center, court finds it "need not" decided whether to adopt *Williams* rule in order to admit evidence obtained in warrantless search of that bag, as court instead applies inevitable discovery rule because of "certainty" that a search warrant for the bag could have been obtained; see criticism of case in § 11.4 note 77).

n. 208.

Cf. United States v. Gust, 405 F.3d 797 (9th Cir.2005) (following *Miller*, infra, court concludes that "the nature of a container" must be determined "without regard for the context in which it is found or the fact that the searching officer had special reasons to believe the container held contraband," for otherwise the "single-purpose container" exception "could swallow the warrant requirement"). See Comment, 30 N.Ill.U.L.Rev. 237 (2009), noting split of authority and favoring position that "extrinsic evidence" may *not* be considered in applying the single-purpose container doctrine.

n. 209.

This distinction is especially significant when the search warrant process would likely impose limits on the extent of the search within the container, as illustrated by State v. Rupnick, 280 Kan. 720, 125 P.3d 541 (2005). A dissenting judge made a *Sanders*-type argument to the effect that a warrantless search of the hard drive of a computer, seized without a warrant on probable cause and in exigent circumstances, would be permissible given the defendant's admissions to an agent of the state gaming agency that while employed by Harrah's Casino he had downloaded to his personal computer "a lot of shit" including "stuff I shouldn't have." The majority rejected such an approach because "a computer is not truly analogous to a simple closed container or conventional file cabinet, even a locked one. Rather, it is the digital equivalent of its owner's home, capable of holding a universe of private information. Further, a computer's outward appearance, unlike the containers dealt with in at least some of the cases cited by the dissent, tells the observer nothing about the content or character of the information or potential evidence contained on its hard drive. In the circumstances of this case, we cannot agree with the dissent's

casual willingness to treat the defendant's statements as a blanket waiver of his reasonable expectation of privacy or his implied consent to law enforcement's unlimited access to his laptop's hard drive."

To the same effect is United States v. Mitchell, 565 F.3d 1347 (11th Cir. 2009). Police in defendant's residence with his consent, upon viewing a desktop computer, asked defendant if it contained child pornography, and he answered in the affirmative, which the court concluded established probable cause justifying removal and seizure of the computer's hard drive. However, the court deemed such a warrantless seizure to be justified only until a search warrant to examine the contents was obtained in a timely fashion(which did not occur in the instant case because of a 21-day delay), so that the container could be returned if the search revealed nothing incriminating. Quoting *Rupnick*, the court noted "this consideration applies with even greater force to the hard drive of a computer."

n. 210.

Compare United States v. Monghur, 576 F.3d 1008 (9th Cir.2009) (distinguishing *Cardona-Rivera*, where incarcerated defendant, aware his phone calls monitored by police, told confederate that he had not been caught with "the thing," which was hidden in another apartment and he had confederate obtain it, as defendant "attempted to disguise the subject matter by using ambiguous, generic language" and "never made a voluntary disclosure directly to law enforcement," which is "materially different from directly and intentionally admitting to a police officer the contraband contents of a specific package or closed container").

n. 211.

Consider also United States v. Monghur, 576 F.3d 1008 (9th Cir.2009) (expressing agreement with *Cardova-Rivera*, note 210 supra, but distinguishing instant case, where defendant in making monitored phone call while in jail did not expressly state he was talking about a weapon when asking caller to retrieve "the thing," as defendant used "ambiguous, generic language to describe the handgun and its whereabouts," and, in any event, "never made a voluntary disclosure directly to law enforcement").

Chapter 6

Entry and Search o

§ 6.1 Basis for entry to arr

(Add new text between "time" note number 10)

(Moreover, under the common search warrant requirement i party only,[10.1] upon objection o absent exigent circumstances, t rant, although in such a case they had a "basis for believing ent in the home."[10.2]

[10.1]See § 11.3, text at note 121.

[10.2]United States v. Jackson, 576 F. here, as police "received a tip that Jac and, upon arrival there, "they asked J and she nodded yes"; court adds it "i rather than something less is needed and does not decide that matter). Co A.2d 521 (D.C.App.2007) (where arres suppression, contrary to *Seagald* facts, visitor suffices, provided there is a rea there, but this court views this requi cause).

n. 14.

Accord with *Litteral*: Ward v. Moo

(Add new text between "requir lowing footnote number 18)

, a purely objective test,[18.1]

PIERCE COUNTY PROSECUTOR

December 19, 2011 - 3:00 PM

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